(21,599.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 193.

HANNAH S. CRANE, MARY IVES CROCKER, AND KATE MAY DILLON WINSHIP, DEVISEES OF KATE D. McLAUGHLIN, DECEASED, AND JAMES T. BOYD, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1910.

1 In the Court of Claims. No. 28,078.

HANNAH S. CRANE, MARY IVES CROCKER and KATE MAY DILLON WINSHIP, Devisees of Kate D. McLaughlin, Deceased, and JAMES T. BOYD.

v.

THE UNITED STATES.

I.—*Petition.*

(Filed June 19, 1905.)

To the Honorable the Court of Claims:

The claimants, Hannah S. Crane, Mary Ives Crocker and Kate May Dillon Winship, devisees of Kate D. McLaughlin, deceased; and James T. Boyd respectfully represent:

The claimants are the identical persons in whose favor this court, on the second day of March, 1896, entered its findings in the case in this court known as Congressional Case No. 643, and were the claimants in that case; and they herewith annex to this petition, as an exhibit thereto, the findings of the court in that case as officially certified to Congress and printed.

The findings in said case were certified to the House of Representatives, in accordance with the provisions of the Act of March 3, 1883, known as the Bowman Act. Subsequently a bill was introduced referring their case back to this court with jurisdiction to enter a judgment therein. Said bill, after being several times favorably reported in different Congresses, finally on the 25th
2 day of February, in the year 1905, became a law under the title of "An Act referring the claim of Hannah S. Crane and others to the Court of Claims."

An officially printed copy of said act is also annexed to this petition as an exhibit thereto.

The claimants refer to the findings entered in said Congressional Case No. 643. By the proceedings set forth in said findings, they acquired a valid title to an undivided one-sixth interest in the property therein described. The market value of their undivided one-sixth of said property, at the time possession was taken of it by the United States, was forty thousand ($40,000) dollars, which amount they claim.

No assignment or transfer of this claim, or of any part thereof or interest therein, has been made; and the claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimants are citizens of the United States. And the claimants ask judgment for forty thousand ($40,000) dollars.

GEORGE A. KING,
Attorney for Claimant.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

James T. Boyd, being duly sworn, deposes and says: I am one of the claimants in this case. I have read the above petition, and the matters herein stated are true, to the best of my knowledge and belief.

JAMES T. BOYD.

Subscribed and sworn to before me this 6th day of June, 1905.

[SEAL.] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

Letter from the Assistant Clerk of the Court of Claims, Transmitting a Copy of the Findings Filed By the Court in the Cases of Hannah S. Crane, Mary Ives Crocker, Kate Mary Dillon, and James S. Boyd Against the United States.

April 6, 1896.—Referred to the Committee on War Claims and ordered to be printed.

Court of Claims, Clerk's Office,

WASHINGTON, *April* 4, 1896.

SIR: Pursuant to the order of the court I transmit herewith a certified copy of the findings filed by the court in the aforesaid cause, which case was referred to this court by the Committee on Claims, House of Representatives, under the act of March 3, 1883.

I am, very respectfully, yours, etc.

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Hon. Thomas B. Reed,
Speaker of the House of Representatives.

[Court of Claims. Congressional case No. 643. Hannah S. Crane, Mary Ives Crocker, and Kate May Dillon, a minor, by her guardian, Kate Dillon Casey, devisees of Kate D. McLaughlin, deceased, and James T. Boyd *v.* The United States.]

Statement of the Case.

The claim or matter in the above-entitled case was transmitted to the court by the Committee on War Claims of the House of Representatives on the 17th day of March, 1886.

George A. King, esq., appeared for the claimants, and the Attorney-General, by Samuel A. Putnam, esq., his assistant, and under his

direction, appeared for the defense and protection of the interests of the United States.

The case was submitted on the 21st day of January, 1896, and the court, upon the evidence and after considering the briefs of counsel on both sides, finds the facts to be as follows:

Findings of Fact.

I.

Under the authority of the act of Congress approved July 3, 1852 (10 Stat. L., 11), entitled "An act to establish a branch of the mint of the United States in California," section 10, page 13, provides:

"*And be it further enacted,* That before the Secretary of the Treasury shall procure or erect the buildings provided for in the second section of this act, or commence operations under any of the provisions of the same, at San Francisco, State of California, it shall first be his duty to make a contract, or contracts for the erection of said buildings, and procuring the machinery necessary for the operations of said mint, at a sum or sums which shall not, in the whole, exceed the sum of three hundred thousand
4 dollars, which said contract or contracts shall be secured by good and sufficient sureties, to the satisfaction of the said Secretary of the Treasury and the President of the United States."

One William A. Barton was the accepted bidder for the contract, but assigned his rights therein to Joseph R. Curtis, with whom the following contract was made:

Contract between James Guthrie, Secretary of the Treasury, for and on account of the United States, of the first part, and Joseph R. Curtis, of San Francisco, California, assignee of William A. Barton, the lowest bidder, and to whom was awarded the building of the mint at said San Francisco, in accordance with the law and the advertisement of the Department, of the second part.

The said party of the second part contracts and agrees with the party of the first part to erect, finish, and complete in San Francisco, California, for account of the United States, a suitable building, and to furnish all the requisite machinery, fixtures, and tools essential for the branch mint in conformity to the act of Congress on the subject. The said building to be erected and finished throughout agreeably to the plans submitted by the party of the second part, and accepted by the party of the first part, numbered 1, 2, 3, 4, 5, and 6, with the detailed specifications engrossed on number 1, and which are hereby substituted for the plans designated in the advertisement.

The party of the second part agrees to furnish all the necessary machinery for a mint to be capable of coining $30,000,000 of gold per annum in a fair proportion of pieces from $1 to $20, together with all necessary fixtures, tools, implements, &c., required for the same. A detailed specification of this machinery, &c., to accompany this contract, and in order to identify the said specifications,

and also the plans, Nos. 1 to 6 referred to above, with this contract, the said specifications of machinery, &c., and plans and specifications of building are to be signed in duplicate by the parties of the first and second part, and are to be considered a part of this contract and equally binding as if incorporated therewith.

And the party of the second part further agrees to complete the said building and furnish and put up the said machinery, tools, and fixtures, and deliver the same in complete working order, on or before the 1st of February, 1854, together with a deed conveying to the United States a good and valid title to the lot of land upon which the building is erected.

The said building, machinery, fixtures, and tools are to be approved and accepted by such person as may be appointed by the Secretary of the Treasury on behalf of the United States, and upon such approval and acceptance, and the delivery of the aforesaid deed to the party of the first part, the said party of the first part agrees to pay, at the Treasury in the city of Washington, to the said party of the second part, or to his heirs, executors, or assigns, the sum of $239,900, which is to be compensation in full for the said lot, building, and machinery.

It is agreed that all the machinery and implements for coining shall be of the very best quality, and equal in all respects to new machinery and implements of like kind in the mint at Philadelphia; and if there should lack in the schedule necessary and proper machinery implements or furniture for a branch mint of the capacity to coin $30,000,000 of gold per annum in pieces of from $1 to $20, that the party of the second part will also furnish them, of the best quality, and have the mint and all the machinery, implements, and tools ready and in complete working order for the business of coining that quantity on or before the first day of February, 1894, aforesaid.

It is agreed that the lot on which the mint is situate fronts 40 feet on a public street of San Francisco and extends back 60 feet, and that the party of the second part will forthwith submit the title of said lot to the attorney of the United States for the eastern district of California, and that he shall report the same to the Attorney-General, of the United States for his opinion, and that if the title be not valid it shall be made so within nine months from the date hereof, to the satisfaction of the Attorney-General, and the party of the second part shall not be entitled to any part of the consideration until this provision is complied with and all the other stipulations of this contract.

It is also further agreed and understood that the party of the second part may purchase the adjoining 20 feet of ground on the west side of said lot, if the same can be obtained at a price which the party of the second part shall approve, and that on the conveyance of the same, together with the lot, mint, &c., contracted for, that the party of the first part will also pay the agreed sum for said 20 feet of additional ground.

It is also covenanted, agreed, and understood that no Member of Congress shall be admitted to any interest in this contract.

In witness whereof the said James Guthrie, Secretary of the Treas-

ury as aforesaid, for and in behalf of the United States as aforesaid, hath hereunto subscribed his name and caused the seal of the Treasury Department to be hereunto affixed, and the said Joseph R. Curtis, assignee of W. A. Barton as aforesaid, hath hereunto subscribed his name and affixed his seal this fifteenth day of April, A. D. 1853.

JAMES GUTHRIE.
JOS. R. CURTIS.

Witness:
F. G. WASHINGTON.
ANNIE B. YOUNG.

A larger lot being found to be necessary, the Secretary of the Treasury made a supplemental contract with said Curtis on July 6, 1853, for the purchase and improvement of an adjoining lot.

The lot named in the original contract, above set forth, had on it a substantial brick building, erected in the year 1851, which was prior to April 15, 1853, used as an assaying office, and was authorized, under the provisions of the act of September 30, 1850 (9 Stat. L., top of p. 531), to assay gold and form the same into bars, and also coined and issued gold coins, being the principal assaying office on the Pacific Coast. Under said contract of April 15, 1853, and the supplemental contract of July 6, 1853, the required alterations and improvements were made and the building accepted by the Secretary of the Treasury for the branch mint of the United States. The machinery and fixtures formerly in use in the assaying office were transferred to the new mint, with some additional machinery required to fit it up for that purpose.

On May 2, 1854, said Joseph R. Curtis made and executed a deed conveying both lots to the United States. The Attorney-General approved the title and the said deed.

The sum of $239,900 was paid to said Curtis as a total compensation for both said original lot and the improvements required to be placed thereon by said original contract, and he was also paid the sums named in the said supplemental contract for the value of said adjoining lot and the improvements placed thereon.

The United States forthwith went into possession, and used the property as the branch mint of the United States, and has been in possession ever since.

II.

Prior to the time of the making of the contract first above set forth, April 15, 1853, the lot named in the original contract had been owned in fee simple by, and was in possession of, Curtis, Perry & Ward, a firm composed of the aforesaid Joseph R. Curtis, Philo H. Perry, and Samuel H. Ward.

On the 22d day of March, 1853, Samuel H. Ward died at sea, while on a voyage to the Sandwich Islands. His death, however, was not known at San Francisco till the 21st of April, 1853. At the time, therefore, when Curtis entered into the contract of April 15, 1853, he

did not know of his partner's death, and as he was dealing with partnership property made the contract for the benefit of the firm.

Ward left a will appointing his partners, Joseph R. Curtis and Philo H. Perry, his executors. Said will was proved and allowed in the probate court of the city and county of San Francisco, and Philo H. Perry alone qualified as executor thereunder.

After the said will was probated, to wit, on the 23d day of August, 1853, the estate of said Ward was appraised by a duly constituted board of appraisers, and the value of the whole lot named in said contract of April 15, 1853, was fixed by them at $40,000.

After said appraisement, to wit, on the 29th day of August, 1853, said Perry, as such executor, made and executed a deed purporting to convey to said Curtis all the interest in said lot named in contract of April 15, 1853, of which said Ward had died seized and possessed, and received in payment therefor the sum of $13,333.33.

By the terms of the said will of said Ward nine-tenths of his estate was bequeathed to his wife, Emily H. S. Ward, and her proportion of the above-named $13,333.33 was duly paid to her by the said executor and accepted by her with full knowledge of the said sale of Perry, as executor, to Curtis, but in ignorance of the extent of her estate in the land in dispute as shown by the decision of the supreme court. (50 Cal., 358.)

On the 18th day of March, 1854, Emily H. S. Ward, together with her colegatees under the will of Samuel H. Ward, filed in the district court of the United States for the northern district of California a bill in equity against the said Curtis and Perry, the material parts of which are as follows:

"And your orator and oratrixes further show, that besides other real and personal estate of great value the testator died seized and possessed in fee, as tenant in common with the defendants Joseph R. Curtis and Philo H. Perry, of a certain piece or parcel of ground in the city of San Francisco, situate on Commercial street, with a frontage of 40 feet on said street, and a depth of 49 feet 9 inches parallel with Montgomery street; which said real estate with the buildings and improvements thereon, together with the machinery, implements, tools, furniture, and fixtures in and of said building,
6 was occupied and used by the defendants, Joseph R. Curtis and Philo H. Perry, and the testator in the business in which they were engaged as copartners in the lifetime of the testator of melting and assaying gold under a certain contract with the United States and on their private account; and that the premises aforesaid, the lot, building, and machinery, tools, implements, furniture and fixtures as aforesaid, were the partnership property of Curtis, Perry & Ward, of which the testator was at the time of his death an equal partner in interest with the defendants, Joseph R. Curtis and Philo H. Perry, the survivors thereof."

The contract with the United States is here alleged.

"And your orator and oratrixes further show that the said contract for building the said branch mint whereby a sale was made of the premises aforesaid to the United States, though made in the name of the defendant Joseph R. Curtis, was in truth and in fact for

the benefit of the copartnership firm of Curtis, Perry & Ward; and they charge and allege that the said Joseph R. Curtis had a distinct understanding with his copartners to that effect, and held their power of attorney authorizing him, in their name and name of said copartnership, to make such a contract, and that the same was not taken in the name of said copartnership, as was the understanding and agreement, because of some alleged informality in said power of attorney, whereby the said Joseph R. Curtis was compelled to contract in his own name and as trustee for the copartnership aforesaid.

"And your orator and oratrixes further show that on or about the 27th day of August, 1853, the defendant Philo H. Perry, as executor of the testator's estate, caused the same to be appraised and returned an inventory and appraisement thereof to the probate court aforesaid, wherein the lot and building known as the 'United States Assay Office' was appraised at $40,000 and the machinery, implements, tools, furniture, and fixtures in said establishment are appraised at $15,150, or thereabouts, as will more fully appear on the production of said inventory and appraisement in this honorable court, and to which leave is craved to refer.

"And your orator and oratrixes further show that the defendant Philo H. Perry as sole executor of the testator aforesaid, on or about the 29th of August, 1853, conveyed the testator's interest in the lot and building aforesaid for the sum of $13,333 to the defendant Joseph R. Curtis, and at or about the same time sold and delivered to the same defendant the testator's interest in the machinery, tools, implements, furniture, and fixtures as aforesaid, at or about the appraised value thereof. And your orator and oratrixes charge that the sale of the testator's interest in said property by the said executor was made at private sale, without any authority therefor from the court of probate, and that the same was for the joint benefit of the defendants as copartners in interest in the contract for the sale of the premises known as the 'United States Assay Office,' and the conversion of the same into a branch mint as aforesaid.

"And your orator and oratrixes further charge that the object and intent of the said sale by his surviving partners, and the sole executor, the defendant Philo H. Perry, to the defendant Joseph R. Curtis, the other surviving partner of the testator, were to deprive the legatees under the testator's will of their just and legal right to participate in the profits of the sale to the United States, as aforesaid; and they further charge that the transaction aforesaid was in violation of the trust and confidence reposed by the testator in his surviving partners and executor aforesaid, and in fraud of his said legatees; that the sum paid for said property by the defendant Joseph R. Curtis, who purchased for the joint benefit of the defendant Philo H. Perry and himself, was greatly under the value thereof, in view of the profits arising from the sale of the same property to the United States as aforesaid; and that by virtue of said pretended sale by the defendant Philo H. Perry to the defendant Joseph R. Curtis the said defendants have dealt with the partnership property of Curtis, Perry & Ward for their individual gain and advantage, and are, and have been since the death of the testator, confederating, combining, and col-

luding to defraud your orator and oratrixes of their just share and proportion of the purchase money arising from the sale of the property aforesaid to the United States as aforesaid.

"And your orator and oratrixes further show that the alterations and additions in and to the building and premises aforesaid, and the additions to the machinery, etc., to adapt the same to the use and purpose of a branch mint, are nearly complete, and that the same will soon be delivered and accepted by the United States, and your orator and oratrixes charge that the said defendants, in the name of the defendant Joseph R. Curtis, have obtained from the United States an advance of $100,000 under the said contract, which has been used and applied in making the alterations and additions to the premises known as the 'United States Assay Office,' required by said contract; that said advance so made as aforesaid will, as they verily believe, cover the entire cost of making the alterations in and additions to said premises, and the cost of the additional machinery, etc., also, and that the premises aforesaid are mortgaged to the United States as the condition of the said advance of money, to
7 secure the same in the contingency of the nonperformance of the contract aforesaid, or the refusal of the Secretary of the Treasury, for any cause, to accept the premises designed for a branch mint as aforesaid, when the same shall be tendered for his acceptance.

"And your orator and oratrixes further charges that the said defendants, if they are permitted to retain the same for their sole benefit, will make a profit, after paying all the costs of adapting the premises aforesaid for the use and purpose of a branch mint, of more than $100,000 over and above the value of the said premises, and the machinery, etc., thereto belonging, as fixed by the appraisement under which the defendants collusively and fraudulently took the said property for their own exclusive use and benefit, all of which acts, doings, and pretenses of the defendants, so in confederation and collusion as aforesaid, are in violation of trust and confidence, contrary to equity and good conscience, and to the manifest injury, oppression, and fraud of your orator and oratrixes, and only cognizable in a court of equity, without the interposition of which they would be wholly remediless."

On March 31, 1854, the said Emily H. S. Ward, through her counsel of record, notified the Secretary of the Treasury of the filing of said bill by letter, inclosing copy of same.

Prior to the receipt of this letter the United States had already paid said Curtis the sum of $100,000, and on May 4, 1854, they paid him $150,000, and on June 13, 1854, they paid him $33,929.10 upon the contracts hereinbefore described.

III.

In the year 1867 one James L. King instituted an action of ejectment in the district court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, against Robert B. Swain to recover possession of one undivided sixth part of the lot named in said first contract.

Said Swain, the defendant in the action, was superintendent of the United States branch mint at San Francisco, and was in possession of the lot and building in that capacity only, claiming no title in himself.

He remained such superintendent, and in possession of the property for some considerable time afterwards, and until his death, and the suit being still pending at his death, on suggestion thereof and on motion of the plaintiff, the suit was continued by order of the court against his successor, O. H. Le Grange, who, as such superintendent, took possession of and occupied the premises for and on behalf of the United States.

The title upon which said King based his claim was the following deed of Emily H. S. Ward to him:

"This indenture, made the 25th day of October, 1865, between Emily H. S. Ward (widow of Samuel Ward, deceased), of New Haven, Connecticut, formerly of Middletown, Connecticut, of the first part, and James L. King, of the city of San Francisco, in the State of California, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of $100, lawful money of the United States, to her in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said party of the second part, and to his heirs and assigns, forever, all that certain lot, piece, or parcel of land lying, being, and situate in the city and county of San Francisco, State of California, bounded and described as follows, viz:"

The land in dispute.

"Also all the estate, right, title, and interest of the party of the first part of, in, and to lands in the city and county of San Francisco, or elsewhere in the State of California, whereof her former husband, Samuel H. Ward, died seized or possessed, excepting 50 vara lots Nos. 250 and 251, which she has conveyed to M. J. Dooly, of Stockton, California, by deed dated September 30, 1865. Also all her interest in the rents, back rents, issues, and profits of any real estate in Cailfornia, whereof her said husband died seized and possessed, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

"And, also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances.

"To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

"In witness whereof the said party of the first part hath
8 hereunto set her hand and seal the day and year first above

written, by Henry W. Starr, her attorney in fact thereunto duly authorized.

"EMILY H. S. WARD,
"By H. W. STARR,
"*Att'y in Fact.*

"Signed, sealed, and delivered in the presence of—
"J. B. NONES.
"A. H. NONES.

"[Stamped.]"

UNITED STATES OF AMERICA.

STATE OF NEW YORK,
City and County of New York, ss:

By this public instrument be it remembered that on this 19th day of March, A. D. 1866, before me, the subscriber, Joseph B. Nones, a commissioner in and for the State of New York, appointed by the governor of the State of California to take proof and acknowledgment of deeds, mortgages, letters of attorney, or any other instrument to be used or recorded in the said State of California, and to administer oaths and affirmations, take depositions, &c., &c., personally appeared Henry W. Starr, attorney in fact of Emily H. S Ward, by power of attorney duly executed and to me produced, the person described in and who executed the annexed instrument, and acknowledged to me that he executed the same voluntarily and freely, for the uses and purposes therein stated, as the free act and deed of said Emily H. S. Ward.

And I further certify that I know the person who made the said acknowledgment to be the identical person described in and who executed the said annexed instrument.

In testimony whereof I have hereunto subscribed my name and affixed my official seal the year, month, and day first before written.

[SEAL.] J. B. NONES,
Commissioner of the State of California
for the State of New York Aforesaid, No. 262 Broadway.

Throughout the suit the United States district attorney, by direction of the Secretary of the Treasury and the Attorney-General, appeared on behalf of the United States for the defendant, and conducted the defense.

The litigation was protracted through a number of years.

On the 15th of August, 1878, said court entered judgment in favor of the plaintiff for the recovery of one undivided sixth part of said lot, together with costs.

From this judgment an appeal was taken to the supreme court of the State of California.

Said court on the 15th day of August, 1882, rendered its judgment affirming the judgment of the court below in favor of the plaintiff.

A writ of error was then obtained from the Supreme Court of the United States to said supreme court of California, but said writ of error was on the 5th day of May, 1884, dismissed by said Supreme Court of the United States.

IV.

The claimants, Hannah S. Crane, Mary Ives Crocker, and Kate Dillon (the latter a minor appearing by her guardian, Kate Dillon Casey, as devisees and legatees of Kate D. McLaughlin, deceased, and James T. Boyd, claim the interest of Emily H. S. Ward, widow of Samuel Ward, by virtue of the following conveyances and proceedings:

James L. King to Chas. M'Laughlin.

This indenture, made the 9th day of September, in the year of our Lord 1879, between James L. King, of the city and county of San Francisco, State of California, the party of the first part, and Charles McLaughlin, of the same place, the party of the second part, witneseth, that the said party of the first part, for and in consideration of the sum of 5 ($5) dollars gold coin of the United States of America, to him in hand paid by the said party of the second part, and other good and valuable considerations, the receipt of which is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the said party of the second part, and to his heirs and assigns forever, all his right, title, and interest in and to all that certain piece, parcel, or tract of land situate, lying, and being in the city and county of San Francisco, State of California, described as follows, to wit:

Commencing at a point on the northerly line of Commercial street, distant 60 (60) feet, westerly from the northwestern corner of
9 Montgomery and Commercial streets, running thence westerly along said northerly line of Commercial street 57 feet and 6 inches (57 6/12) and running thence at right angles northerly 59 feet and 9 inches (59 9/12), running thence at right angles easterly 57 feet and 6 inches (57 6/12) and running thence at right angles southerly 59 feet and 9 inches (59 9/12) to the place of beginning.

The same being a part of the Curtis, Perry, and Ward lot and any other lands owned by party of the first part or any interest therein in the city and county of San Francisco, State of California.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above —.

JAMES L. KING. [SEAL.]

Signed, sealed, and delivered in presence of—

SAM'L S. MURFEY.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 9th (9th) day of September, A. D. 1879, before me, Sam'l S. Murfey, a notary public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared James L. King, known to me to be the person described in and who executed and whose name is subscribed to the within and annexed instrument, and he acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.]

SAM'L S. MURFEY,
Notary Public.

This indenture, made the seventh day of November, in the year of our Lord one thousand eight hundred and sixty-seven, between James L. King, of the city of New York, formerly of the city of San Francisco, California, of the first part, and William W. Crane, Jr., and James T. Boyd, of the city of San Francisco, the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ten dollars, gold coin of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said parties of the second part, and to their heirs and assigns forever, all of the one undivided third part of all the estate, real and personal, which was conveyed to the said party of the first part by Emily H. S. Ward, widow of Samuel H. Ward, deceased, in and by that certain conveyance bearing date the 25th day of October, A. D. 1865, and recorded in the county recorder's office of the city and county of San Francisco, in liber No. 324 of deeds, at page 127, excepting the lot of land in said deed particularly described being a portion of the lot number (91) ninety-one of the hundred vara lot survey of said city, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said parties of the second part, their heirs and assigns, forever.

In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written by his duly authorized attorney in fact, F. J. Thibault.

JAMES L. KING, [SEAL.]
By His Attorney in Fact, F. J. THIBAULT.

Signed, sealed, and delivered in presence of—
HENRY HAIGHT.

[Cancel- 50-cent Int. Rev. Stamp.]

10 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 8th day of November, A. D. 1867, before me, Henry Haight, a notary public in and for said city and county, duly commissioned and sworn, personally appeared F. J. Thibault, personally known to me to be the same person who executed by power of attorney the annexed instrument as the attorney in fact of James L. King, said James L. King being named in the annexed instrument as party thereto, and therein described as the party executing the same by his said attorney; and the said F. J. Thibault acknowledged to me that he executed the same freely and voluntarily, as and for the act and deed of the said James L. King, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] HENRY HAIGHT,
Notary Public.

In the Superior Court of the County of Alameda, State of California.

In the Matter of the Estate of WM. W. CRANE, JR., Deceased.

Hannah S. Crane, executrix of the last will and testament of Wm. W. Crane, Jr., deceased, having heretofore, to wit, on the 21st day of January, A. D. 1885, filed an account of her administration of said estate, as and for a final settlement thereof, and having also on said day filed with said account her petition for a distribution of said estate, and this court having thereupon on said day last aforesaid made an order fixing Monday, the 9th day of February A. D. 1885, at ten o'clock a. m. of said day, as the time for the hearing and settlement of said account and the hearing of said petition for distribution, and directing the clerk to give notice thereof by causing notices to be posted in at least three public places in the county of Alameda, State of California, at least ten days before said day of settlement and distribution, and on said 9th day of February, A. D. 1885, at said hour of ten o'clock a. m., said account and said petition for distribution coming on regularly to be heard and proof being made to the satisfaction of this court that the clerk of this court had caused notice to be given of said hearing of said account, and of

said petition for distribution, in all respects as required by law and said order of this court directing the same, and this court having examined the records, files, and papers in the matter of said estate, and it being shown to the satisfaction of this court from such examination and the proofs adduced that by the administration had upon the estate of said Wm. W. Crane, Jr., deceased, all the debts that have been presented and allowed against said estate have been fully paid.

* * * * * * *

That in and by the last will and testament of said Wm. W. Crane, Jr., deceased, on file and of record in this court, the whole of the estate of said Wm. W. Crane, Jr., deceased, was given, devised, and bequeathed unto Hannah S. Crane, the surviving wife of said deceased, and the executrix of the estate of said deceased above named.

Now, therefore, on motion of John H. Boalt, Esquire, attorney for said executrix, and no objections having been made or filed to said account or to any item thereof, or to said petition for distribution, and the written consent of Mary Nancy Crane Hussey, the daughter of said deceased, and the only heir at law of said deceased besides said petitioner, and also the consent of Horace Potter Hussey, husband of said Mary Nancy Crane Hussey, to the entry of said decree of distribution being filed herein,

It is hereby ordered, adjudged, and decreed:

That all the acts and proceedings of said executrix be, and the same are hereby, approved and confirmed. That the account of said executrix be, and the same is hereby, settled, approved, and confirmed as rendered.

That the following-described real estate now in the hands of said executrix and belonging to the estate of said deceased, to wit:

* * * * * * *

"Fourth. All that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, and bounded and particularly described as follows, to wit: Commencing at a point on the southwesterly line of Tenth street, distant one hundred and ninety-five (195) feet northwesterly from the corner formed by the intersection of said southwesterly line of Tenth street with the northwesterly line of Mission street; thence running northwesterly along said southwesterly line of Tenth street fifty-five (55) feet; thence at right angles southwesterly parallel with Mission street one hundred (100) feet; thence at right angles
11 southeasterly parallel with Tenth street fifty-five (55) feet, and thence at right angles northeasterly parallel with said Mission street one hundred (100) feet to the point of beginning.

"Fifth. All that certain lot, piece, or parcel, of land situate, lying, and being in the city and county of San Francisco, State of California, bounded and particularly described as follows, to wit: Commencing at a point on the northerly line of Fifteenth street, distant eighty-seven (87) feet and three (3) inches easterly from the corner formed by the intersection of the easterly line of Guerrero street with the said northerly line of Fifteenth (15th) street, and

thence running easterly along said northerly line of Fifteenth street four hundred and seventy-two (472) feet and nine (9) inches to the corner formed by the intersection of said northerly line of Fifteenth street with the westerly line of Valencia street; thence northerly along said westerly line of Valencia street sixty-five (65) feet; thence at right angles westerly and parallel with Fifteenth street four hundred and sixty-four (464) feet; thence southwesterly in a straight line to the point of commencement on the said northerly line of Fifteenth street.

"Sixth. All that certain lot, piece, or parcel of land situate, lying and being in the city and county of San Francisco, State of California, bounded and particularly described as follows, to wit: Commencing at a point on the northerly line of Fulton street distant one hundred and ten (110) feet westerly from the corner formed by the intersection of the said northerly line of Fulton street with the westerly line of Webster street; thence running westerly along said northerly line of Fulton street twenty-seven (27) feet and six (6) inches; thence at right angles northerly and parallel with said Webster street one hundred (100) feet; thence at right angles easterly and parallel with Fulton street twenty-seven (27) feet and six (6) inches, and thence at right angles southerly and parallel with said Webster street one hundred (100) feet to the point of beginning.

"Seventh. The undivided one-half of all that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, to wit: The undivided one-half of lot number fourteen hundred and fifty-two (1452) of the fifty (50) Vara lot survey of the city of San Francisco be, and the same is hereby, assigned, transferred, and distributed to the said Hannah S. Crane, the surviving wife of said deceased and sole devisee under the will of said deceased, for her own benefit, use, and behoof forever."

It is further ordered, adjudged, and decreed that any and all other property, real, personal, or mixed, and wheresoever situate, of which said Wm. W. Crane, Jr., deceased, died seized or possessed, or in or to which he had any right, title, or interest, or in or to which the estate of said deceased had or has since acquired any right, title, interest, or estate whatsoever, be, and the same is hereby, assigned, transferred, and distributed to said Hannah S. Crane.

It is hereby further ordered, adjudged, and decreed that the said Hannah S. Crane, executrix as aforesaid, be, and she is hereby, fully and finally discharged from her trust as such executrix.

Done in open court this ninth day of February, A. D. 1885.

N. HAMILTON, *Judge.*

Endorsed: Filed Feb. 9, 1885. Charles T. Boardman, county clerk. By Frank J. Krauth, deputy clerk.

V.

Record in the Probate Court of San Francisco County, Cal.

Probate Court.

In the Matter of the Last Will and Testament of SAMUEL H. WARD, Dec'd.

SAN FRANCISCO, CO., *ss:*

George R. Ward, George K. Gluyas, and Moses E. Flanagan, being duly sworn, each for himself deposes and says, that he will truly, honestly, and impartially appraise the property which shall be exhibited to them by Philo H. Perry, executor of said last will and testament, according to the best of his knowledge and ability.

GEO. R. WARD.
M. E. FLANAGAN.
GEO. K. GLUYAS.

Subscribed and sworn this 23rd day of August, 1853, before me.

[SEAL.]

F. T. LYNCH,
Not. Pub.

12 Probate Court.

In the Matter of the Last Will and Testament of SAMUEL H. WARD, Dec'd. Inventory Indorsed. Filed Aug. 26, '53. Bailey, D. C.

The executor amends the foregoing inventory by stating that the dec'd died at sea on the 22d day of March, 1853; that intelligence of his death was received in San Francisco on the 21st day of April, following, but that, for convenience, his interest in the firm of Curtis, Perry & Ward is continued to the 30th April, on which day the value of said interest in the personal property is inventoried and appraised, and by adding the following item, inadvertently omitted from said inventory, viz:

An interest of one-third (⅓) in the rent of said U. S. apar., lot, and building from the 1st day of May, 1853, to the 29th August following, 3 mos., 29 days, at $1,250 per month, $5,000; ⅓, 1,666.66.

San Francisco, October 31st, 1853.

GEO. R. WARD,
GEO. K. GLUYAS,
M. E. FLANAGAN,
Appraisers.

Probate Court.

In the Matter of the Last Will and Testament of SAM'L H. WARD, Dec'd. Additional Inventory. Filed Dec. 9th, 1853.

Office of the County Clerk of the City and County of San Francisco, *ss:*

I, Wm. J. Blattner, county clerk of the city and county of San Francisco, and *ex officio* clerk of the superior court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the inventory and the additional inventory in the matter of the estate of Samuel H. Ward, deceased, now on file and of record in my office.

Witness my hand and the seal of said court this 21st day of March; A. D. 1892.

[SEAL.]

WM. J. BLATTNER, *Clerk*,
By D. S. GARWOOD,
Deputy Clerk.

(Indorsed:) Certified copies inventories of estate of Samuel H. Ward. Crane v. The U. S. Claimants' Exhibit No. 4. Deposition of John Heuston, jr. June 8th, 1892. J. S. Manley, commissioner.

BY THE COURT.

Filed March 2, 1896.
A true copy.
Test this 4th day of April, 1896.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

13 [Public—No. 106.]

An Act Referring the Claim of Hannah S. Crane and Others to the Court of Claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred on the Court of Claims to hear the claim of Hannah S. Crane and others for the value of certain real property in the city of San Francisco, in the State of California, in which they claim an undivided one-sixth interest, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said real property as claimed, said court shall award the said parties the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States. And before receiving the same, all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property, and any defense, set-off, or counter-claim may be pleaded by the United

States, as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

Approved, February 25, 1905.

14 II. *General Traverse.*

Filed January 18, 1909.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. A. VAN ORSDEL,
Assistant Attorney-General.

15 III. *Argument and Submission.*

This case was argued by Mr. George A. King for the claimants, and by Mr. Frederick De C. Faust for the defendants, and submitted January 19, 1909.

16 IV. *Findings of Fact and Conclusion of Law.*

Filed February 15, 1909.

Findings of Fact.

I.

Under the authority of the act of Congress approved July 3, 1852 (10 Stat. L., 11), entitled "An act to establish a branch of the mint of the United States in California," section 10, page 13, provides:

"*And be it further enacted,* That before the Secretary of the Treasury shall procure or erect the buildings provided for in the second section of this act, or commence operations under any of the provisions of the same, at San Francisco, State of California, it shall first be his duty to make a contract, or contracts, for the erection of said buildings, and procuring the machinery necessary for the operations of said mint, at a sum or sums which shall not, in the whole, exceed the sum of three hundred thousand dollars, which said contract or contracts shall be secured by good and sufficient sureties, to the satisfaction of the said Secretary of the Treasury and the President of the United States."

One William A. Barton was the accepted bidder for the contract, but assigned his rights therein to Joseph R. Curtis, with whom the following contract was made:

Contract between James Guthrie, Secretary of the Treasury, for and on account of the United States, of the first part, and Joseph R. Curtis, of San Francisco, California, assignee of William A. Barton, the lowest bidder, and to whom was awarded the building of the mint at San Francisco, in accordance with the law and the advertisement of the department, of the second part.

The said party of the second part contracts and agrees with the party of the first part to erect, finish, and complete in San Francisco, California, for account of the United States, a suitable building, and to furnish all the requisite machinery, fixtures, and
17 tools essential for the branch mint in conformity to the act of Congress on the subject. The said building to be erected and finished throughout agreeably to the plans submitted by the party of the second part, and accepted by the party of the first part, numbered 1, 2, 3, 4, 5, and 6, with the detailed specifications engrossed on number 1, and which are hereby substituted for the plans designated in the advertisement.

The party of the second part agrees to furnish all the necessary machinery for a mint to be capable of coining $30,000,000 of gold per annum in a fair proportion of pieces from $1 to $20, together with all necessary fixtures, tools, implements, &c., required for the same. A detailed specification of this machinery, &c., to accompany this contract, and in order to identify the said specifications, and also the plans, Nos. 1 to 6 referred to above, with this contract, the said specifications of machinery, &c., and plans and specifications of building are to be signed in duplicate by the parties of the first and second part, and are to be considered a part of this contract and equally binding as if incorporated therewith.

And the party of the second part further agrees to complete the said building and furnish and put up the said machinery, tools, and fixtures, and deliver the same in complete working order, on or before the 1st of February, 1854, together with a deed conveying to the United States a good and valid title to the lot of land upon which the building is erected.

The said building, machinery, fixtures, and tools are to be approved and accepted by such person as may be appointed by the Secretary of the Treasury on behalf of the United States, and upon such approval and acceptance, and the delivery of the aforesaid deed to the party of the first part, the said party of the first part agrees to pay, at the Treasury in the city of Washington, to the said party of the second part, or to his heirs, executors, or assigns, the sum of $239,900, which is to be compensation in full for the said lot, building, and machinery.

It is agreed that all the machinery and implements for coining shall be of the very best quality, and equal in all respects to new machinery and implements of like kind in the mint at Philadel-

phia; and if there should lack in the schedule of necessary and proper machinery, implements, or furniture for a branch mint of the capacity to coin $30,000,000 of gold per annum in pieces of from $1 to $20, that the party of the second part will also furnish them, of the best quality, and have the mint and all the machinery, implements, and tools ready and in complete working order for the business of coining that quantity on or before the first day of February, 1854, aforesaid.

It is agreed that the lot on which the mint is situate fronts 40 feet on a public street of San Francisco and extends back 60 feet, and that the party of the second part will forthwith submit the title of said lot to the attorney of the United States for the eastern district of California, and that he shall report the same to the Attorney-General of the United States for his opinion, and that if the title be not valid it shall be made so within nine months from the date hereof, to the satisfaction of the Attorney-General, and the party of the second part shall not be entitled to any part of the consideration until this provision is complied with and all the other stipulations of this contract.

It is also further agreed and understood that the party of the second part may purchase the adjoining 20 feet of ground
18 on the west side of said lot, if the same can be obtained at a price which the party of the second part shall approve, and that on the conveyance of the same, together with the lot, mint, &c., contracted for, that the party of the first part will also pay the agreed sum for said 20 feet of additional ground.

It is also covenanted, agreed, and understood that no Member of Congress shall be admitted to any interest in this contract.

In witness whereof the said James Guthrie, Secretary of the Treasury as aforesaid, for and in behalf of the United States as aforesaid, hath hereunto subscribed his name and caused the seal of the Treasury Department to be hereunto affixed, and the said Joseph R. Curtis, assignee of W. A. Barton, as aforesaid, hath hereunto subscribed his name and affixed his seal this fifteenth day of April, A. D. 1853.

JAMES GUTHRIE.
JOS. R. CURTIS.

Witness:
P. G. WASHINGTON.
ANNIE B. YOUNG.

A larger lot being found to be necessary, the Secretary of the Treasury made a supplemental contract with said Curtis on July 6, 1853, for the purchase and improvement of an adjoining lot.

The lot named in the original contract, above set forth, had on it a substantial brick building, erected in the year 1851, which was, prior to April 15, 1853, used as an assaying office, and was authorized, under the provisions of the act of September 30, 1850 (9 Stat. L., top of p. 531), to assay gold and form the same into bars, and also coined and issued gold coins, being the principal assaying office on the Pacific coast. Under said contract of April 15, 1853, and the supplemental contract of July 6, 1853, the required alterations and

improvements were made and the building accepted by the Secretary of the Treasury for the branch mint of the United States. The machinery and fixtures formerly in use in the assaying office were transferred to the new mint, with some additional machinery required to fit it up for that purpose.

On May 2, 1854, said Joseph R. Curtis made and executed a deed conveying both lots to the United States. The Attorney-General approved the title and the said deed.

The sum of $239,900 was paid to said Curtis as a total compensation for both said original lot and the improvements required to be placed thereon by said original contract, and he was also paid the sums named in the said supplemental contract for the value of said adjoining lot and the improvements placed thereon.

The United States forthwith went into possession, and used the property as the branch mint of the United States, and has been in possession ever since.

II.

Prior to the time of the making of the contract first above set forth, April 15, 1853, the lot named in the original contract had been owned in fee simple by, and was in possession of, Curtis, Perry & Ward, a firm composed of the aforesaid Joseph R. Curtis, Philo H. Perry, and Samuel H. Ward.

19 On the 22d day of March, 1853, Samuel H. Ward died at sea, while on a voyage to the Sandwich Islands. His death, however, was not known at San Francisco till the 21st of April, 1853. At the time, therefore, when Curtis entered into the contract of April 15, 1853, he did not know of his partner's death, and as he was dealing with partnership property made the contract for the benefit of the firm.

Ward left a will appointing his partners, Joseph R. Curtis and Philo H. Perry, his executors. Said will was proved and allowed in the Probate Court of the city and county of San Francisco, and Philo H. Perry alone qualified as executor thereunder.

After the said will was probated, to wit, on the 23d day of August, 1853, the estate of said Ward was appraised by a duly constituted board of appraisers, and the value of the whole lot named in said contract of April 15, 1853, was fixed by them at $40,000.

After said appraisement, to wit, on the 29th day of August, 1853, said Perry, as such executor, made and executed a deed purporting to convey to said Curtis all the interest in said lot named in contract of April 15, 1853, of which said Ward had died seized and possessed, and received in payment therefor the sum of $13,333.33.

By the terms of the said will of said Ward nine-tenths of his estate was bequeathed to his wife, Emily H. S. Ward, and her proportion of the above-named $13,333.33 was duly paid to her by the said executor and accepted by her with full knowledge of the said sale of Perry, as executor, to Curtis, but in ignorance of the extent of her estate in the land in dispute, as shown by the decision of the supreme court. (50 Cal., 358; 61 Cal., 221.) The conveyance made by said Perry and Curtis was in pursuance of the power and

authority granted to said Perry, executor aforesaid, by the terms and provisions of the last will and testament of said Ward.

On the 18th day of March, 1854, Emily H. S. Ward, together with her colegatees under the will of Samuel H. Ward, filed in the District Court of the United States for the Northern District of California a bill in equity against the said Curtis and Perry, the material parts of which are as follows:

"And your orator and oratrixes further show that besides other real and personal estate of great value the testator died seized and possessed in fee, as tenant in common with the defendants, Joseph R. Curtis and Philo H. Perry, of a certain piece or parcel of ground in the city of San Francisco, situate on Commercial street, with a frontage of 40 feet on said street, and a depth of 49 feet 9 inches parallel with Montgomery street; which said real estate with the buildings and improvements thereon, together with the machinery, implements, tools, furniture, and fixtures in and of said building, was occupied and used by the defendants, Joseph R. Curtis and Philo H. Perry, and the testator in the business in which they were engaged as copartners in the lifetime of the testator of melting and assaying gold under a certain contract with the United States and on their private account; and that the premises aforesaid, the lot, building, and machinery, tools, implements, furniture, and fixtures as aforesaid, were the partnership property of Curtis, Perry & Ward, of which the testator was at the time of his death an equal partner in interest with the defendants, Joseph R. Curtis and Philo H. Perry, the survivors thereof."

The contract with the United States is here alleged.

20 "And your orator and oratrixes further show that the said contract for building the said branch mint whereby a sale was made of the premises aforesaid to the United States, though made in the name of the defendant Joseph R. Curtis, was in truth and in fact for the benefit of the copartnership firm of Curtis, Perry & Ward; and they charge and allege that the said Joseph R. Curtis had a distinct understanding with his copartners to that effect, and held their power of attorney authorizing him, in their name and name of said copartnership, to make such a contract, and that the same was not taken in the name of said copartnership, as was the understanding and agreement, because of some alleged informality in said power of attorney, whereby the said Joseph R. Curtis was compelled to contract in his own name and as trustee for the copartnership aforesaid.

"And your orator and oratrixes further show that on or about the 27th day of August, 1853, the defendant Philo H. Perry, as executor of the testator's estate, caused the same to be appraised and returned an inventory and appraisement thereof to the Probate Court aforesaid, wherein the lot and building known as the 'United States Assay Office' was appraised at $40,000 and the machinery, implements, tools, furniture, and fixtures in said establishment are appraised at $15,150, or thereabout, as will more fully appear on the production of said inventory and appraisement in this honorable court, and to which leave is craved to refer.

"And your orator and oratrixes further show that the defendant Philo H. Perry, as sole executor of the testator aforesaid, on or about the 29th of August, 1853, conveyed the testator's interest in the lot and building aforesaid for the sum of $13,333 to the defendant Joseph R. Curtis, and at or about the same time time sold and delivered to the same defendant the testator's interest in the machinery, tools, implements, furniture, and fixtures as aforesaid, at or about the appraised value thereof. And your orator and oratrixes charge that the sale of the testator's interest in said property by the said executor was made at private sale, without any authority therefor from the Court of Probate, and that the same was for the joint benefit of the defendants as corpartners in interest in the contract for the sale of the premises known as the 'United States Assay Office,' and the conversion of the same into a branch mint as aforesaid.

"And your orator and oratrixes further charge that the object and intent of the said sale by his surviving partners and the sole executor, the defendant Philo H. Perry, to the defendant Joseph R. Curtis, the other surviving partner of the testator, were to deprive the legatees under the testator's will of their just and legal right to participate in the profits of the sale to the United States, as aforesaid; and they further charge that the transaction aforesaid was in violation of the trust and confidence reposed by the testator in his surviving partners and executor aforesaid, and in fraud of his said legatees; that the sum paid for said property by the defendant Joseph R. Curtis, who purchased for the joint benefit of the defendant Philo H. Perry and himself, was greatly under the value thereof, in view of the profits arising from the sale of the same property to the United States as aforesaid; and that by virtue of said pretended sale by the defendant Philo H. Perry to the defendant Joseph R. Curtis the said defendants have dealt with the partnership property of Curtis, Perry & Ward for their individual gain and advantage, and are, and have
21 been since the death of the testator, confederating, combining, and colluding to defraud your orator and oratrixes of their just share and proportion of the purchase money arising from the sale of the property aforesaid to the United States as aforesaid.

"And your orator and oratrixes further show that the alterations and additions in and to the building and premises aforesaid, and the additions to the machinery, etc., to adapt the same to the use and purpose of a branch mint, are nearly complete, and that the same will soon be delivered and accepted by the United States, and your orator and oratrixes charge that the said defendants, in the name of the defendant Joseph R. Curtis, have obtained from the United States an advance of $100,000 under the said contract, which has been used and applied in making the alterations and additions to the premises known as the 'United States Assay Office,' required by said contract; that said advance so made as aforesaid will, as they verily believe, cover the entire cost of making the alterations in and additions to said premises, and the cost of the additional machinery, etc., also, and that the premises aforesaid are mortgaged to the United States as the condition of the said advance of money, to secure the same in the contingency of the nonperformance of the contract

aforesaid, or the refusal of the Secretary of the Treasury, for any cause, to accept the premises designed for a branch mint as aforesaid, when the same shall be tendered for his acceptance.

"And your orator and oratrixes further charge that the said defendants, if they are permitted to retain the same for their sole benefit, will make a profit, after paying all the costs of adapting the premises aforesaid for the use and purpose of a branch mint, of more than $100,000 over and above the value of the said premises, and the machinery, etc., thereto belonging, as fixed by the appraisement under which the defendants collusively and fraudulently took the said property for their own exclusive use and benefit, all of which acts, doings, and pretenses of the defendants, so in confederation and collusion as aforesaid, are in violation of trust and confidence, contrary to equity and good conscience, and to the manifest injury, oppression, and fraud of your orator and oratrixes, and only cognizable in a court of equity, without the interposition of which they would be wholly remediless."

On March 31, 1854, the said Emily H. S. Ward, through her counsel of record, notified the Secretary of the Treasury of the filing of said bill by letter, inclosing copy of same. This bill was in June, 1854, dismissed by complainants' counsel of record.

Prior to the receipt of this letter the United States had already paid said Curtis the sum of $100,000, and on May 4, 1854, they paid him $150,000, and on June 13, 1854, they paid him $33,929.10 upon the contracts hereinbefore described.

III.

"Whereas Philo H. Perry, esq., executor of the last will and testament of Samuel H. Ward, esq., late of San Francisco, deceased, having heretofore paid me, the undersigned, Grace T. Starr, at Middletown, Conn., at sundry times, the aggregate sum of $37,914.58, for and on account of the trust created by said will in favor of Emily H. S. Ward, has this day completed the payment of the
22 balance of the said trust fund, amounting to the sum of $18,893.54, the said payment being made to me as trustee, under the decree and order of the Supreme Court of the State of New York, at a special term, held at the court-house in Riverhead, on the 20th day of May, A. D. 1855, upon the petition of Philo H. Perry, Grace T. Starr, Emily H. S. Ward, and others reference being had to the records of said court, for all particulars, and the said payment having been made partly in cash and partly in securities, I hereby, in pursuance of the said order of said court, and by authority thereof, do acknowledge the receipt of the sums above mentioned from the said Philo H. Perry, in full acquittance and discharge of him, the said Perry, of and from the trust above referred to, created by said will.

"Witness my hand and seal this 10th day of July, A. D. 1855.

"[SEAL.] "GRACE T. STARR, *Trustee.*

"In presence of—
"CLARA C. PRATT."

"Received of Philo H. Perry, executor of the last will and testament of Samuel H. Ward, late of San Francisco, deceased $2,913.48, being balance in full of the legacy and distributive share of Maria N. Verner and James D. Verner, her husband, under the will of the said Samuel H. Ward, and in full of all demands against him to this date.

"And whereas a suit is now pending in the Northern District of California, the same James D. and Maria N. Verner against the said Philo H. Perry, as executor, and the said Philo H. Perry and Joseph R. Curtis, individually, for certain claims growing out of the erection of the branch mint at San Francisco, now, therefore, in pursuance of the annexed power, I do hereby authorize the discontinuance of the said suit without costs to the plaintiff, each party paying their own costs. And I do further, by virtue of said power, hereby release and discharge the said Philo H. Perry as executor, as aforesaid, and the said Perry and Curtis, individually, from all claims, debts, dues, or demands due to the said James D. Verner and Maria N. Verner, by reason of the contract or under said will, or any other matter or thing, to the date of these presents.

"In witness whereof, I have hereunto set my hand and seal this twelfth day of July, 1855.

[SEAL.] "JAMES D. VERNER,
"By LEFFERT G. WILKEN, *Attorney.*

[SEAL.] "MARIA N. VERNER,
"By LEFFERT G. WILKEN, *Attorney.*

"Witness present:
"SAM'L ELYM."

"To the Justices of the Supreme Court of the State of New York:

"The petition of Philo H. Perry, sole acting executor of the last will and testament of Samuel H. Ward, late of San Francisco, in the State of California, Emily H. S. Ward, widow of Samuel H. Ward, Grace T. Starr, Elihu W. A. Starr, Eben T. Starr, Henry W. Starr, Frederick B. Starr, Hamilton Brewer, and Mary E., his wife, and Grace A. Dyer, all of Middletown, in the State of Connecticut, except said Eben T. Starr, who is of the city of New York.

23 "Respectfully showeth: That the said Samuel H. Ward departed this life on or about the 21st day of March, A. D. 1853, at sea, on his passage from San Francisco, which was then his place of residence, to the Sandwich Islands, having theretofore made a last will and testament, which will was duly proved in the month of August thereafter, in the Probate Court of San Francisco, aforesaid, and a copy of which is hereto annexed.

"That your petitioner, Philo H. Perry, took upon himself the sole execution of said will.

"That said Samuel H. Ward, in his lifetime, was a member of the firm of Curtis, Perry & Ward, in which the said Philo H. Perry was also a partner.

"That a large proportion of the property and estate of the said testator consisted of his interest in the real estate in which the said partners were tenants in common and the personal effects in which

they were jointly interested. That said executor has received into his hands the principal part of said estate, amounting in all to this time to the sum of $69,957.04.

"And that the amount paid out in the settlement of the same and executor's commissions to this time is $6,836.92.

"And your petitioners further show that, under and by virtue of the provisions of said will, the said Philo H. Perry, as executor, as aforesaid, has paid to the said Grace T. Starr, as trustee of the said Emily H. S. Ward, under the provisions of said will, the sum of $37,914.58, and that there is a balance of cash and securities in his hands belonging to said trust fund of $18,893.54.

"And your petitioners further show that your petitioner, Grace T. Starr, is the mother of your petitioner, Emily H. S. Ward, who is now a widow without living issue; and that the said Elihu W. N. Starr, Eben T. Starr, Henry W. Starr, Frederick B. Starr, Mary E., wife of Hamilton Brewer, and Grace A. Dyer are the only brothers and sisters of the said Emily H. S. Ward, all of whom are of full age, and, in case of her death, are her only present heirs at law.

"And your petitioners further show that your petitioner, Philo H. Perry, has left the State of California, and is now a resident of the State of New York, and the whole of said fund belonging to the said trust created for the benefit of the said Emily H. S. Ward, except a portion of that portion paid to the said Grace T. Starr, is now either on deposit or invested in the city and county of New York.

"And that the said petitioner, Philo H. Perry, is desirous of paying over the whole balance of said trust fund to the said Grace T. Starr, under the direction and authority of this court, and to receive a discharge and acquittance for the same, as well as for the amount already paid to her.

"Your petitioner, who represents all the parties interested in said fund, whether as trustees or *cestui que trust*, therefore pray that the said Philo H. Perry may be discharged from the trust created by said will for the benefit of the said Emily H. S. Ward, and that the said Grace T. Starr may be appointed the trustee for the same, to receive and invest the same according to the provisions of said will.

"And upon receipt of the same, to discharge the said Perry from his liabilities therefor by reason of said trust, and that the said Grace T. Starr, for the faithful execution of said trust, may give for
24 her sureties the several petitioners, or some of them, except the said Philo H. Perry, and may have such other or further relief as may be proper.

"PHILO H. PERRY.
"EMILY H. S. WARD.
"EBEN T. STARR.
"HENRY W. STARR.
"MARY C. BREWER.
"GRACE T. STARR.
"E. W. N. STARR.
"F. B. STARR.
"HAMILTON BREWER.
"G. A. DYER."

"STATE OF CONNECTICUT, *ss:*

"On this 24th day of March, A. D. 1855, before me came Grace T. Starr, Emily H. S. Ward, E. W. N. Starr, F. B. Starr, Hamilton Brewer, Mary E. Brewer, and G. A. Dyer, all of the city of Middletown, in said county above named, to me known to be the persons described in, and who signed the written petition, who, being by me severally sworn, depose and say that the within petition is true of their own knowledge, except as to such matters as are therein stated to be upon information and belief; and as to those matters, they believe it to be true.

"Before me, Jonathan Barnes, a commissioner for the State of New York, duly appointed by the governor thereof to take acknowledgment and proof of deeds, and to administer oaths, etc., to be used or recorded in said State of New York.

"In testimony whereof, I have hereto set my hand and my official seal, in said city of Middletown, on the day and year first aforesaid.

[SEAL.] "JONATHAN BARNES,
"A Commissioner for the State of New York Dwelling in the City of Middletown."

Here follows a copy of the will of Samuel H. Ward.

"STATE OF NEW YORK,
"City and County of New York, ss:

"Be it remembered that on the 27th day of March, 1855, before me personally came Philo H. Perry, Eben T. Starr, and Henry Starr, to me known to be three of the persons described in, and who subscribed the foregoing written petition, who being by me severally duly sworn and each for himself, say that the said written petition is true to their own knowledge, except as to such matters as are therein stated on infrmation and belief, and as to those matters they believe it to be true.

"SYLVESTER LAY,
"Commissioner of Deeds."

25 "At a special term of the Supreme Court, Held for the State of New York at the Court House in Riverhead, in the County of Suffolk, on the 30th Day of May, A. D. 1855.

"Present: Hon. S. B. Strong, Justice.

"In the Matter of the Estate of SAMUEL H. WARD, Deceased.

"On reading and filing the petition of Philo H. Perry, executor of the last will and testament of Samuel H. Ward, late of San Francisco, in the State of California, setting forth among other things that said testator departed this life on the 21st day of March, 1853, leaving a last will and testament, a copy of which is annexed to said petition That the petitioner took upon himself the sole execution of said will That he had received into his hands as such executor $69,957.04 and paid out in the settlement of said estate the sum of $6,836.94.

"That under said will said testator has paid to Grace T. Starr, as trustee of Emily H. S. Ward, the sum of $37,914.58, and that there is a balance of cash and securities in his hands belonging to said fund of $18,893.54.

"That the petitioner, Philo H. Perry, is now a resident of the State of New York, and that said fund is now in this State, and that all the *cestui que trusts* under said will are of full age and join in said petition; and that said Perry is desirous of paying over the whole of said balance under the direction and authority of this court.

"On motion of Mr. Ayon, of counsel for the petitioners, it is ordered that it be referred to John W. Mills, esq., to take an account of the acts and doings of the said Philo H. Perry, as executor and trustee aforesaid, and of his accounts as such; and that the said Philo H. Perry, upon the coming in of said report establishing the balance in cash and securities in his hands belonging to said trust funds created by said will, be discharged from his trust by paying over said balance in cash or securities to Grace T. Starr, who is hereby appointed trustee of the said fund, upon her filing her bond to the *cestui que trust* with the clerk of the county of Westchester, with the several persons named in said petition as her sureties, except the petitioners Henry W. Starr and Hamilton Brewer, and that Mary E. Brewer join in said bond in the place of the said Hamilton Brewer; and it is further ordered that upon such payment and delivery the said Grace T. Starr be authorized to receipt for the same to the said Philo H. Perry, in full acquittance and discharge of the trust created by the will above referred to; and upon filing said receipt and discharge it is hereby ordered that the said Philo H. Perry be discharged from said trust and all liability thereof or by reason thereof.

"(Indorsed:) Clerk of Westchester, enter this order. James B. Cooper, Clerk.

"Enter this order on report.

"S. B. S."

"Supreme Court.

"In the Matter of the Last Will and Testament of SAMUEL H. WARD, Deceased.

"To the Justices of the Supreme Court:

"I, John W. Mills, to whom this matter was referred by an order of this court, bearing date the 1st day of June, A. D. 1855, do certify and report that Samuel H. Ward, late of San Francisco, in the
26 State of California, departed this life, leaving a last will and testament, as stated in the petition in this matter; that in and by said will he created a trust of nine-tenths of the net proceeds of his estate for the benefit of his widow, Emily H. S. Ward, for her life, to be divided among the lawful heirs of the said Emily at her death.

"That the said Emily is now unmarried, and without issue; that all the persons that would be her lawful heirs in the event of her

death at this time have joined in said petition, and are of lawful age, and have stated and settled the account of the said Philo H. Perry, as executor under said will, and assented to the correctness of the same.

"And I do further report that the said whole amount received by the said Philo H. Perry of said trust fund, from the estate of said Samuel H. Ward, is the sum of $56,808.09; that the said Perry has paid to the said Grace T. Starr, as directed by said will, the sum of $37,914.58; and that there is a balance in his hands belonging to said estate of $18,893.55, besides interest upon the sum of $18,000, invested on mortgage, from the first day of November last past, at seven (7) per cent, to pay over to said Grace T. Starr, as aforesaid; and I do further report that $18,000 of said sum is well invested upon bond mortgage upon unincumbered real estate in the city of New York. All of which is respectfully submitted.

"JOHN W. MILLS, *Referee.*

"Dated June 6th, 1865.

"(Indorsed:) Moved and confirmed in open court, June 6th, 1855. Robert R. Oakley, Clerk.

"Filed December 9th, 1872.

"By ROBERT McKEE, *D. C.*
"WM. HARNEY, *Clerk.*"

IV.

In the year 1867 one James L. King instituted an action of ejectment in the District Court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, against Robert B. Swain to recover possession of one undivided sixth part of the lot named in said first contract.

Said Swain, the defendant in the action, was superintendent of the United States branch mint at San Francisco, and was in possession of the lot and building in that capacity only, claiming no title in himself.

He remained such superintendent, and in possession of the property for some considerable time afterwards, and until his death, and the suit being still pending at his death, on suggestion thereof and on motion of the plaintiff, the suit was continued by order of the court against his successor, O. H. La Grange, who, as such superintendent, took possession of and occupied the premises for and on behalf of the United States.

The title upon which said King based his claim was the following deed of Emily H. S. Ward to him:

"This indenture, made the 25th day of October, 1865, between Emily H. S. Ward (widow of Samuel Ward, deceased), of New Haven, Connecticut, formerly of Middletown, Connecticut, of the first part, and James L. King, of the city of San Francisco, in the State of California, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum
27 of $100, lawful money of the United States, to her in hand paid by the said party of the second part, at or before the en-

sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said party of the second part, and to his heirs and assigns, forever, all that certain lot, piece, or parcel of land lying, being, and situate in the city and county of San Francisco, State of California, bounded and described as follows, viz:"

The land in dispute.

"Also all the estate, right, title, and interest of the party of the first part of, in, and to lands in the city and county of San Francisco, or elsewhere in the State of California, whereof her former husband, Samuel H. Ward, died seized or possessed, excepting 50 vara lots Nos. 250 and 251, which she has conveyed to M. J. Dooly, of Stockton, California, by deed dated September 30, 1865. Also all her interest in the rents, back rents, issues, and profits of any real estate in California, whereof her said husband died seized and possessed, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

"And also, all the estate, right, title, interest, property possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the above described premises, and every part and parcel thereof, with the appurtenances

"To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

"In witness whereof the said party of the first part hath hereunto set her hand and seal the day and year first above written, by Henry W. Starr, her attorney in fact thereunto duly authorized.

"[SEAL.] EMILY H. S. WARD,
"By H. W. STARR,
"Att'y in Fact.

"Signed, sealed, and delivered in the presence of—
"J. B. NONES.
"A. H. NONES.

"[Stamped.]"

"UNITED STATES OF AMERICA,
"State of New York,
"City and County of New York, ss:

"By this public instrument be it remembered that on this 19th day of March, A. D. 1866, before me, the subscriber, Joseph B. Nones, a commissioner in and for the State of New York, appointed by the governor of the State of California to take proof and acknowledgment of deeds, mortgages, letters of attorney, or any other instrument to be used or recorded in the said State of California, and to administer oaths and affirmations, take depositions, &c., &c., personally appeared Henry W. Starr, attorney in fact of Emily H.

S. Ward, by power of attorney duly executed and to me produced, the person described in and who executed the annexed instrument, and acknowledged to me that he executed the same voluntarily and freely, for the uses and purposes therein stated, as the free act and deed of said Emily H. S. Ward.

28 "And I further certify that I know the person who made the said acknowledgment to be the identical person described in and who executed the said annexed instrument.

"In testimony whereof I have hereunto subscribed my name and affixed my official seal the year, month, and day first before written.

"[SEAL.] J. B. NONES,

"Commissioner of the State of California for the State of New York Aforesaid, No. 262 Broadway."

Throughout the suit the United States district attorney, by direction of the Secretary of the Treasury and the Attorney-General appeared on behalf of the United States for the defendant, and conducted the defense.

The litigation was protracted through a number of years.

On the 15th of August, 1878, said court entered judgment in favor of the plaintiff for the recovery of one undivided sixth part of said lot, together with costs.

From this judgment an appeal was taken to the Supreme Court of the State of California.

Said court on the 15th day of August, 1882, rendered its judgment affirming the judgment of the court below in favor of the plaintiff.

A writ of error was then obtained from the Supreme Court of the United States to said Supreme Court of California, but said writ of error was on the 5th day of May, 1884, dismissed by said Supreme Court of the United States.

V.

The claimants, Hannah S. Crane, Mary Ives Crocker, and Kate Dillon (the latter a minor appearing by her guardian, Kate Dillon Casey), as devisees and legatees of Kate D. McLaughlin, deceased, and James T. Boyd, claim the interest of Emily H. S. Ward, widow of Samuel Ward, by virtue of the following conveyances and proceedings:

"James L. King to Chas. M'Laughlin.

"This indenture, made the 9th day of September, in the year of our Lord 1879, between James L. King, of the city and county of San Francisco, State of California, the party of the first part, and Charles McLaughlin, of the same place, the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of 5 ($5) dollars gold coin of the United States of America, to him in hand paid by the said party of the second part, and other good and valuable considerations, the receipt of which is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the

said party of the second part, and to his heirs and assigns forever, all his right, title, and interest in and to all that certain piece, parcel, or tract of land situate, lying, and being in the city and county of San Francisco, State of California, described as follows, to wit:

"Commencing at a point on the northerly line of Commercial street, distant 60 (60) feet, westerly from the northwestern corner of Montgomery and Commercial streets, running thence west-
29 erly along said northerly line of Commercial street 57 feet and 6 inches (57 6/12) and running thence at right angles northerly 59 and 9 inches (59 9/12), running thence at right angles easterly 57 feet and 6 inches (57 6/12) and running thence at right angles southerly 59 feet and 9 inches (59 9/12) to the place of beginning.

"The same being a part of the Curtis, Perry, and Ward lot and any other lands owned by party of the first part or any interest therein in the city and county of San Francisco, State of California.

"Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises and every part and parcel thereof with the appurtenances.

"To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns, forever.

"In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above.

"JAMES L. KING. [SEAL.]

"Signed, sealed, and delivered in presence of—
"SAM'L S. MURFEY."

Charles McLaughlin died testate, his wife, Kate D. McLaughlin, being his sole residuary legatee and devisee. Before any distribution of the estate was had the said Kate D. McLaughlin also died testate, devising all her property to Mary Virginia Ives, then a femme sole, now Mary Ives Crocker, and Kate May Dillon, then a femme sole, now Kate May Dillon Winship. This devise became perfected by the vestiture, under proper legal proceedings, of title in the devisees on May 23, 1890.

"STATE OF CALIFORNIA,
City and County of San Francisco, ss:

"On this 9th (9th) day of September, A. D. 1879, before me, Sam'l S. Murfey, a notary public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared James L. King, known to me to be the person described in and who executed and whose name is subscribed to the within and annexed instrument, and he acknowledged to me that he executed the same.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

"[SEAL.] SAM'L S. MURFEY,
"Notary Public."

"This indenture, made the seventh day of November, in the year of our Lord one thousand eight hundred and sixty-seven, between James L. King, of the city of New York, formerly of the city of San Francisco, California, of the first part, and William W. Crane, Jr., and James T. Boyd, of the city of San Francisco, the party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ten dollars, gold coin of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said parties of the second part, and to their heirs and assigns forever, all of the one undivided third part of all the estate, real and personal, which was conveyed to the said party of the first part by Emily H. S. Ward, widow of Samuel H. Ward, deceased, in and by that certain conveyance bearing date the 25th day of October, A. D. 1865, and recorded in the county recorder's office of the city and county of San Francisco, in liber No. 324 of deeds, at page 127, excepting the lot of land in said deed particularly described being a portion of the lot number (91) ninety-one of the hundred vara lot survey of said city, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances.

"To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said parties of the second part, their heirs and assigns, forever.

"In witness whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written by his duly authorized attorney in fact, F. J. Thibault.

"JAMES L. KING, [SEAL.]
"By His Attorney in Fact, F. J. THIBAULT.

"Signed, sealed, and delivered in presence of—
"HENRY HAIGHT.

"[Cancel- 50-cent Int. Rev stamp.]"

"STATE OF CALIFORNIA,
"City and County of San Francisco, ss:

"On this 8th day of November, A. D. 1867, before me, Henry Haight, a notary public in and for said city and county, duly com-

missioned and sworn, personally appeared F. J. Thibault, personally known to me to be the same person who executed by power of attorney the annexed instrument as the attorney in fact of James L. King, said James L. King being named in the annexed instrument as party thereto, and therein described as the party executing the same by his said attorney; and the said F. J. Thibault acknowledged to me that he executed the same freely and voluntarily, as and for the act and deed of the said James L. King, and for the uses and purposes therein mentioned.

"In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] "HENRY HAIGHT,
"Notary Public."

"In the Superior Court of the County of Alameda, State of California.

"In the Matter of the Estate of WM. W. CRANE, JR., Deceased.

"Hannah S. Crane, executrix of the last will and testament of Wm. W. Crane, Jr., deceased, having heretofore, to wit, on the 21st day of January, A. D. 1885, filed an account of her administration of said estate, as and for a final settlement thereof, and having also on said day filed with said account her petition for a distribution of
31 said estate, and this court having thereupon on said day last aforesaid made an order fixing Monday, the 9th day of February, A. D. 1885, at ten o'clock a. m. of said day, as the time for the hearing and settlement of said account and the hearing of said petition for distribution, and directing the clerk to give notice thereof by causing notices to be posted in at least three public places in the county of Alameda, State of California, at least ten days before said day of settlement and distribution, and on said 9th day of February, A. D. 1885, at said hour of ten o'clock a. m., said account and said petition for distribution coming on regularly to be heard and proof being made to the satisfaction of this court that the clerk of this court had caused notice to be given of said hearing of said account, and of said petition for distribution, in all respects as required by law and said order of this court directing the same, and this court having examined the records, files, and papers in the matter of said estate, and it being shown to the satisfaction of this court from such examination and the proofs adduced that by the administration had upon the estate of said Wm. W. Crane, Jr., deceased, all the debts that have been presented and allowed against said estate have been fully paid.

* * * * * * *

"That in and by the last will and testament of said Wm. W. Crane, jr., deceased, on file and of record in this court, the whole of the estate of said Wm. W. Crane, jr., deceased, was given, devised, and bequeathed unto Hannah S. Crane, the surviving wife of said deceased, and the executrix of the estate of said deceased above named.

"Now, therefore, on motion of John H. Boalt, esquire, attorney for said executrix, and no objections having been made or filed to said account or to any item thereof, or to said petition for distribution and the written consent of Mary Nancy Crane Hussey, the daughter of said deceased, and the only heir at law of said deceased besides said petitioner, and also the consent of Horace Potter Hussey, husband of said Mary Nancy Crane Hussey, to the entry of said decree of distribution being filed herein,

"It is hereby ordered, adjudged, and decreed:

"That all the acts and proceedings of said executrix be, and the same are hereby, approved and confirmed. That the account of said executrix be, and the same is hereby, settled, approved, and confirmed as rendered.

"That the following-described real estate now in the hands of said executrix and belonging to the estate of said deceased, to wit:

* * * * * * *

"Fourth. All that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, and bounded and particularly described as follows, to wit: Commencing at a point on the southwesterly line of Tenth street, distant one hundred and ninety-five (195) feet northwesterly from the corner formed by the intersection of said southwesterly line of Tenth street with the northwesterly line of Mission street; thence running northwesterly along said southwesterly line of Tenth street fifty-five (55) feet; thence at right angles southwesterly parallel with Mission street one hundred (100) feet; thence at right angles southeasterly parallel with Tenth street fifty-five (55) feet, and
32 thence at right angles northeasterly parallel with said Mission street one hundred (100) feet to the point of beginning.

"Fifth. All that certain lot, piece, or parcel of land situate, lying and being in the city and county of San Francisco, State of California, bounded and particularly described as follows, to wit: Commencing at a point on the northerly line of Fifteenth street, distant eighty-seven (87) feet and three (3) inches easterly from the corner formed by the intersection of the easterly line of Guerrero street with the said northerly line of Fifteenth (15th) street, and thence running easterly along said northerly line of Fifteenth street four hundred and seventy-two (472) feet and nine (9) inches to the corner formed by the intersection of said northerly line of Fifteenth street with the westerly line of Valencia street; thence northerly along said westerly line of Valencia street sixty-five (65) feet; thence at right angles westerly and parallel with Fifteenth street four hundred and sixty-four (464) feet; thence southwesterly in a straight line to the point of commencement on the said northerly line of Fifteenth street.

"Sixth. All that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, bounded and particularly described as follows, to wit: Commencing at a point on the northerly line of Fulton street distant one hundred and ten (110) feet westerly from the corner formed by the intersection of the said northerly line of Fulton street with the

westerly line of Webster street; thence running westerly along said northerly line of Fulton street twenty-seven (27) feet and six (6) inches; thence at right angles northerly and parallel with said Webster street one hundred (100) feet; thence at right angles easterly and parallel with Fulton street twenty-seven (27) feet and six (6) inches, and thence at right angles southerly and parallel with said Webster street one hundred (100) feet to the point of beginning.

"Seventh. The undivided one-half of all that certain lot, piece, or parcel of land situate, lying, and being in the city and county of San Francisco, State of California, to wit: The undivided one-half of lot number fourteen hundred and fifty-two (1452) of the fifty (50) vara lot survey of the city of San Francisco be, and the same is hereby, assigned, transferred, and distributed to the said Hannah S. Crane, the surviving wife of said deceased, and sole devisee under the will of said deceased, for her own benefit, use, and behoof forever.

"It is further ordered, adjudged, and decreed that any and all other property, real, personal, or mixed, and wheresoever situate, of which said Wm. W. Crane, jr., deceased, died seized or possessed, or in or to which he had any right, title, or interest, or in or to which the estate of said deceased had or has since acquired any right, title, interest, or estate whatsoever, be, and the same is hereby, assigned, transferred, and distributed to said Hannah S. Crane.

"It is hereby further ordered, adjudged, and decreed that the said Hannah S. Crane, executrix as aforesaid, be, and she is hereby, fully and finally discharged from her trust as such executrix.

"Done in open court this ninth day of February, A. D. 1885.

"N. HAMILTON, *Judge.*

("Endorsed:) Filed Feb. 9, 1885. Charles T. Boardman, county clerk. By Frank J. Krauth, deputy clerk."

33 VI.

"*Record in the Probate Court of San Francisco County, Cal.*

"Probate Court.

"In the Matter of the Last Will and Testament of SAMUEL H. WARD, Dec'd.

"SAN FRANCISCO CO., *ss:*

"George R. Ward, George K. Gluyas, and Moses E. Flanagan, being duly sworn, each for himself, deposes and says, that he will truly, honestly, and impartially appraise the property which shall be exhibited to them by Philo H. Perry, executor of said last will and testament, according to the best of his knowledge and ability.

"GEO. R. WARD.
"M. E. FLANAGAN.
"GEO. K. GLUYAS.

"Subscribed and sworn this 23rd day of August, 1853, before me.
[SEAL.] F. T. LYNCH, *Not. Pub.*

"Probate Court.

"In the Matter of the Last Will and Testament of SAMUEL H. WARD, Dec'd.

Inventory Indorsed.

Filed Aug. 26, '53. Baily, D. C.

"The executor amends the foregoing inventory by stating that the dec'd died at sea on the 22d day of March, 1853; that intelligence of his death was received in San Francisco on the 21st day of April, following, but that, for convenience, his interest in the firm of Curtis, Perry & Ward is continued to the 30th April, on which day the value of said interest in the personal property is inventoried and appraised, and by adding the following item, inadvertently omitted from said inventory, viz:

"An interest of one-third (⅓) in the rent of said U. S. apar., lot, and building from the 1st day of May, 1853, to the 29th August following, 3 mos., 29 days, at $1,250 per month, $5,000; ⅓, 1,666.66.

"San Francisco, October 31st, 1853.

"GEO. R. WARD,
"GEO. K. GLUYAS,
"M. E. FLANAGAN,
"Appraisers."

"Probate Court.

"In the Matter of the Last Will and Testament of SAM'L H. WARD, Dec'd.

Additional Inventory.

Filed Dec. 9th, 1853.

"OFFICE OF THE COUNTY CLERK,
"Of the City and County of San Francisco, ss:

"I, Wm. J. Blattner, county clerk of the city and county of San Francisco, and *ex officio* clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true, and correct copy of the inventory and the additional inventory in the matter of the estate of Samuel H. Ward, deceased, now on file and of record in my office.

"Witness my hand and the seal of said court this 21st day of March, A. D. 1892.

[SEAL.]

"WM. J. BLATTNER, *Clerk,*
"By D. S. GARWOOD,
Deputy Clerk.

34 "(Indorsed:) Certified copies inventories of estate of Samuel H. Ward. Crane v. The U. S. Claimants' Exhibit No. 4. Deposition of John Heuston, Jr. June 8th, 1892. J. S. Manley, commissioner. Filed March 2, 1896. A true copy. Test this 4th day of April, 1896. Seal. John Randolph, Assistant Clerk Court of Claims.

VII.

The value of the undivided one-sixth interest of Emily H. S. Ward widow of Samuel H. Ward, in the property in suit was at the time possession was taken by the United States $6,666.66.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the petition be dismissed.

V.—*Opinion.*

BOOTH, J., delivered the opinion of the court.

This is a case under a special jurisdictional statute. The claimants, Hannah S. Crane and others, contend for a one-sixth interest in a certain lot or parcel of real estate purchased by the Government, and upon which it located the branch mint at San Francisco, Cal. The property in question originally belonged to Joseph R. Curtis, Philo H. Perry, and Samuel H. Ward, copartners doing business under the firm name of Curtis, Perry & Ward. The partnership was organized for and engaged in the business of assaying gold, forming the same into bars, and under the act of September 30, 1850, (9 Stat. L., 531), coined and issued gold coins. The Congress on July 3, 1852, passed an act (10 Stat. L., 11) to establish a branch mint of the United States in California. In pursuance of said legislation the proper officers of the Treasury Department entered into a contract with Joseph R. Curtis for the purpose of securing a suitable building and proper furnishings and equipments to carry into execution the provisions of the above law. This contract made on the 15th day of April, 1853, was, notwithstanding its personal character, indisputably made for and on behalf of the copartnership of Curtis, Perry & Ward. Samuel H. Ward, the junior partner just named, died at sea while on a voyage to the Sandwich Islands on March 22, 1853, some time previous to the execution of the above contract. This fact was unknown to his copartners at the time of the execution of the contract, and was not brought home to them until April 21, 1853. The unknown and unexpected death of said Ward furnishes the complications out of which this controversy arises. Said Ward died testate, leaving to his widow, Emily H. S. Ward, nine-tenths of his entire estate, both real and personal, and the remaining one-tenth to a near relative; his copartners, Joseph R. Curtis and Philo H. Perry, were appointed his executors and given full power and authority to manage, sell, dispose of, and control all his estate, real, personal, and mixed.

The contract made with Curtis, as before observed, called for the sale to the Government of the lot and building, together with
35 its furnishings and equipment, belonging to the copartnership. Ward's will was admitted to probate, and Philo H. Perry alone qualified as executor of his estate. All of Ward's estate, including all the property covered by the Curtis contract, was duly

inventoried and appraised, the appraisers fixing the value of the property here in suit at $40,000, one-third of which, $13,333.33, belonged to Ward's estate. Perry, as executor aforesaid, with full power and authority so to do, conveyed, or at least attempted to convey, to Curtis all of Ward's interest in said partnership property, paying the full consideration mentioned by the board of appraisers, nine-tenths of which amount was paid to Emily H. S. Ward, which she received with full knowledge of the whole transaction and without the slightest protest or objection. In 1850 the legislature of California passed an act changing the law of property as respects husband and wife by creating an estate in community. (Laws of 1850, p. 255, sec. 11.) The statute of 1850 creating the community estate was first construed by the Supreme Court of California in 1855 (Beard v. Knox, 5 Cal., 252), wherein the court held that immediately upon the death of one communal owner one-half of the community estate vested in fee simple in the survivor, and was not subject to testamentary disposition, notwithstanding the fee simple title of the whole originally stood in the name of the decedent. In March, 1854, Emily H. S. Ward and her co-legatees under the will of her husband filed a bill in equity in the district court for the northern district of California against said Curtis and Perry, surviving partners of her late husband. The allegations of the bill contain a full recital of all the transactions between Curtis and Perry and between Curtis and the Government. It is replete with charges of fraud and circumvention as between the surviving partners and the complainants, but nowhere repudiates, disaffirms, or seeks to annul the sale of said premises to the defendants. The bill concludes with a prayer for an accounting and seeks a division of alleged profits supposed to have been earned by reason of the aforesaid Curtis contract with the defendants. The Secretary of the Treasury was notified of the filing of this bill, because, under the Curtis contract and before the filing of said bill, Curtis had received $100,000 on his contract from said officer. The case was never brought to trial and subsequently dismissed by complainants.

In October, 1865, Emily H. S. Ward conveyed all her alleged interest in the property here in suit to James L. King, the consideration expressed in the deed being $100. In 1867 King commenced an action of ejectment in the District Court for the Fifteenth Judicial District of California against the superintendent of said branch mint, who was in possession of and operating the same for the Government. This suit was decided adversely to complainant's contention in the trial court, but subsequently reversed and remanded by the Supreme Court of California. (King v. La Grange, 50 Cal., 328.) The case again reached the Supreme Court of the State on its second trial, and was finally determined in favor of the plaintiff, in effect holding that the will of said Samuel H. Ward disposed of only such an estate as he could by law devise, which did not include his widow's one-half interest in the communal property, and that she had performed no act, nor acquiesced in the performance of any, which constituted a ratification of the alleged disposition of her communal interest in her husband's property since his death, fully sustaining King's conten-

tion and upholding his assertion to an undivided interest in
36 the undivided one-sixth interest formerly belonging to his grantor, Mrs. Ward.

The various transfers by which the claimants claim title to the property are set forth in the findings; they are not challenged in any way, and require no comment. It does appear, however, and is a fact to which we shall hereafter refer, that subsequent to Ward's death his widow returned East, and Perry, the executor of Ward's will, removed to New York, where he filed in the Supreme Court of said State a petition for final discharge as such executor, to which Mrs. Ward was a party and to which she did not object.

The jurisdictional act (33 Stat. L., 815) provides as follows:

"An Act Referring the Claim of Hannah S. Crane and Others to the Court of Claims.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred on the Court of Claims to hear the claim of Hannah S. Crane and others for the value of certain real property in the city of San Francisco, in the State of California, in which they claim an undivided one-sixth interest, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said real property as claimed, said court shall award the said parties the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States. And before receiving the same, all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property, and any defense, set-off, or counter-claim may be pleaded by the United States, as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

Claimants' case, viewed from any aspect, is devoid of equitable consideration. If the preference given is to be sustained at all, it must rest upon a strict adherence to legal construction as decided by the Supreme Court of California in the two cases heretofore cited. The cases relied upon as *stare decisis* were between parties strangers to this record, and if decisive of this case limit the court to what the Congress might well have done without any reference to the court, paid the claim in full, for it was possessed of all the information previously certified under a Bowman Act reference in 1896. The case of United States vs. Lee, 106 U. S., 196, settled the question of the right of the plaintiffs to maintain in the courts of California the suits which they instituted respecting the title to the land in controversy as between the parties thereto; but it has never been held, so far as we are able to ascertain (certainly no authority has been cited in the brief of counsel for claimants), that any such judgment concluded the United States or in anywise estopped it from asserting its rights in the premises. In United States v. Lee, p. 222, Mr. Justice Miller, speaking for the court, said: * * * the Govern-

ment is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained.
37 Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined." The above quotation from the Lee case, supra, is the court's affirmance of the decision of the same court in Carr v. United States, 98 U. S., 433. In the latter case the question of the conclusiveness of a judgment of a court of competent jurisdiction in an ejectment suit brought by an alleged owner of the real estate against agents of the Government in possession, and claiming the right of same in virtue of such agency, was squarely decided, the court holding that the United States could not be estopped from the assertion of its rights by proceedings against its tenants or agents. It will be observed that the Carr case was a bill in equity filed by the United States to quiet the title to certain property in San Francisco, Cal., claimed by the Government, and as to which the state courts had previously rendered decisions adversely to the Government's contention in direct proceedings against its own agents in possession by its authority and consent. Three suits, at least two of which went directly to validity of title, and in one of which the United States district attorney appeared for and on behalf of the defendants, were decided in favor of the plaintiff. The case is strikingly similar to the one at bar, and while it is true that the decisions just mentioned were by the lower courts, it is nevertheless true that the question of title was fully gone into, and in so far as the parties thereto are concerned is *res adjudicata.*

The Government is not suable except by its own consent, and until such consent is given by appropriate legislation no judgment or decree of any court concludes its right to assert its defenses or prefer its claims. (United States v. Lee, 106 U. S., 196; Carr v. United States, 98 U. S., 433; Scranton v. Wheeler, 57 Fed., 807.)

The jurisdictional statute under which we are now proceeding refutes by its terms the contention of claimants herein. If the court is estopped from entering into the merits of the controversy and determining for itself the validity of the title to the property in suit, then the reference of the claim was an idle proceeding. It would indeed be a travesty upon justice to refer to the Government's tribunal a claim as to which the court had nothing to do except indulge in mathematical calculation and enter judgment accordingly. The act would simply resolve itself into legislation designed to revive and pay a claim previously litigated to conclusion, but lost to settlement by lapse of time. The Congress never so intended in the act of jurisdiction. We are charged with according full probative effect to the evidence already filed in the case, and permitted to consider "such additional legal evidence as may be hereafter presented on either side." The proceedings are to be in all respects, except as

specifically modified, in accord with the general jurisdiction of this tribunal, and expressly reserving to the defendants the right of *any defense* available.

The Congress neither recognized the validity of the claim nor the validity of claimants' title to the land in question. It did recognize the right to assert a claim and provided a forum wherein the respective rights of both parties to the case might be judicially determined and set at rest.

This court, by entering into the merits of the claim as presented by the jurisdictional statute, does not in anywise contravene
38 the well-established doctrine as laid down in Clarke v. Clarke, 178 U. S., 186, and Wharton v. White, 176 U. S., 484. These two cases establish beyond controversy that the Supreme Court will, in so far as it is possible to do so, conform to the rule of property as established by the supreme tribunal of a State respecting controversies concerning such property. In other words, where the decisions of the highest court of a State have definitely and conclusively established a rule of property the Supreme Court in interpreting the state law will follow, if possible, the decisions of the state court. The decision herein does not invade a settled rule of property as established by the Supreme Court of California; it in no wise ignores or contradicts the legal existence of a communal estate as between husband and wife; nor disregards settled law as to power of testamentary disposition over the same. It simply grants to the defendants their day in court, a right paramount in extent, the denial of which is fatal to all judgments or decrees rendered either against the person or property of one not a party to the record. The defendants are not concluded by the decisions of the state court of California from resorting to a bill to quiet title or from commencing a suit in ejectment wherein the "title of the United States could be judicially determined." (Lee case, supra.)

The defendants are now, and for the first time, asserting in a direct proceeding that the facts and circumstances surrounding the transaction *as now presented* do not bring the same within the decisions of the Supreme Court of California rendered many years ago.

We have amended the findings; we have considered new testimony; and in all respects treated the case as pending under the general jurisdiction of the court, as modified by the jurisdictional statute.

The findings disclose that claimants' grantor, Mrs. Ward, was, at the time of the conveyance from Perry to Curtis, fully acquainted with the situation and in possession of the facts attendant thereon. It is true that she was ignorant of the extent of her estate in the land in question, and that the conveyance aforesaid did not, standing alone without ratification, transfer her undivided, one-half interest in the communal property of her deceased husband. There can be no doubt that Ward intended to devise all the property here in suit; his devisees so understood it; his executors so understood it; and Mrs. Ward accepted without protest the value of the entire lot, including her communal interest therein, as fixed by the board of appraisers. In 1854, about one year subsequent to the above transfer, Mrs. Ward and her colegatees, evidently believing that the sur-

viving partners of her deceased husband were attempting to or did overreach them in the sale to the United States of the partnership property, filed the bill in chancery heretofore mentioned. The United States was not a party to said proceeding, neither was any of its officers or agents mentioned as defendants therein. The gravamen of the complaint was fraud and deceit upon the part of Curtis and Perry, the only defendants to the bill, setting out in *hæc verbæ* the contract between Curtis and the United States. Not a word of complaint respecting the loss of title to her communal interest in the property, seeking only an accounting as between the parties to the transaction and an equitable and conscionable distribution of the profits arising from the conveyance aforesaid. The bill itself was subsequently dismissed *by the complainants.*

In 1855 the case of Beard v. Knox, supra, was decided by the Supreme Court of California. Under this decision Mrs.
39 Ward became for the first time acquainted with the extent of her interest in the estate of her deceased husband and her title to the property in question. Remedies were then immediately available for the correction of this alleged injury. The courts of California were open to Mrs. Ward for the assertion of her claim, and suits to quiet title or in ejectment were clearly maintainable. (Carr v. United States, supra.) No such proceedings were commenced by Mrs. Ward, but ten years thereafter, to wit, on October 25, 1865, as the findings show, she conveyed for a nominal consideration all her interest in the premises in question to one James L. King. In 1867 King asserts his claim of title with the successful result heretofore mentioned. (King v. La Grange, supra.) It is worthy of notice, however, that notwithstanding the judgment in favor of King, no attempt was ever made by him to enforce said judgment or recover possession of the disputed premises. On the contrary, King conveys to McLaughlin in 1879, for a recited consideration of $5 in gold, and to Crane and Boyd in 1867 for a recited consideration of $10 in gold.

It is indeed a strange proceeding, certainly inequitable, to now permit Mrs. Ward's grantees to assert against the defendants a claim which she permitted to repose for ten years without ever resorting to any established legal remedy, and which was notoriously open to disaffirmance or repudiation during this long period of time. There is absolutely nothing in the record which even hints at a repudiation of Perry's acts in conveying all the estate of both Mr. and Mrs. Ward in the partnership property to Curtis. There is nothing to show that Mrs. Ward was dissatisfied with the transfer in question or sought to annul the same at any time subsequent to its execution. In 1855, prior to said conveyance to King, Perry filed in the Supreme Court of New York a petition in which Mrs. Ward and all other *cestui que trusts* of Ward's will joined, setting forth in detail his management of Ward's estate, including the disposition of all the real estate here involved, with copy of Ward's will annexed, which after reference to a referee for authentication was fully approved and said executor discharged without objection or protest.

As was said in Lafitte v. Godchaux, 35 La. Ann., p. 161, a case cited in defendants' brief, "The genius of our law does not favor the claims of those who have long slept upon their rights and who, after years of inertia, conveying an assurance of acquiescence in a given state of things suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of courts for relief under the operation of a newly discovered technical error in some ancient transaction or settlement."

If the facts found in this case do not constitute a ratification of an act done by one without authority to act in the first instance, it is difficult to perceive how the doctrine of ratification can be sustained.

This case was once before Congress upon findings of fact under the act of March 3, 1883, commonly known as the Bowman Act. The findings so reported have been amended and some new findings made, but the action of the court under the Bowman Act as respects the findings then made has not been disturbed. The jurisdictional act admits of additional testimony and the new findings made are in strict accord with the new facts in the record.

The petition is dismissed.

40 VI.—*Final Judgment.*

At a Court of Claims held in the City of Washington, D. C., on the 15th day of February, 1909, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant and do order, adjudge and decree that the petition of the said Hannah S. Crane; Mary Ives Crocker, and Kate May Dillon Winship, Devisees of Kate D. McLaughlin, deceased, and James T. Boyd, be, and the same is hereby, dismissed.

By THE COURT.

41 VII.—*Claimants' Application for and Allowance of Appeal.*

Now come the claimants, Hannah S. Crane, Mary Ives Crocker, and Kate May Dillon Winship, Devisees of Kate D. McLaughlin, deceased, and James T. Boyd, by their attorney of record, and make application for, and give notice of, an appeal to the Supreme Court of the United States, from the judgment of this court rendered on the 15th day of February, 1909, dismissing the petition.

GEORGE A. KING,
Attorney of Record.

Filed in open Court April 12, 1909.

Ordered: That this appeal be allowed as prayed for.

By THE COURT.

42 In the Court of Claims.

No. 28078.

HANNAH S. CRANE, MARY IVES CROCKER, and KATE MAY DILLON WINSHIP, Devisees of Kate D. McLaughlin, Deceased, and JAMES T. BOYD

vs.

THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, and opinion of the Court, of the judgment of the Court dismissing the petition, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 14 day of April, 1909.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 21,599. Court of Claims. Term No. 193. Hannah S. Crane, Mary Ives Crocker, and Kate May Dillon Winship, devisees of Kate D. McLaughlin, deceased, and James T. Boyd, appellants, vs. The United States. Filed April 15th, 1909. File No. 21,599.

FILED.
JUN 22 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 32.

MARY N. HUSSEY, Administratrix of the estate of HANNAH S. CRANE, deceased; MARY IVES CROCKER and KATE MAY DILLON WINSHIP, devisees of KATE D. McLAUGHLIN, deceased; and RICHARD H. GLASSFORD, executor of JAMES T. BOYD, deceased, *Appellants*,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

GEORGE A. KING,
Attorney for Appellants.

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Supreme Court of the United States.

October Term, 1911.

MARY N. HUSSEY, Administratrix of the estate of HANNAH S. CRANE, deceased; MARY IVES CROCKER, and KATE MAY DILLON WINSHIP, devisees of KATE D. McLAUGHLIN, deceased; and RICHARD H. GLASSFORD, executor of JAMES T. BOYD, deceased, *Appellants*,

v.

THE UNITED STATES.

No. 32.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

I. Statement of Case.

The appellants in this court, claimants in the court below, are the persons referred to in the following act of Congress, 33 Stat. L. 815; Rec. pp. 17, 18:

"An Act Referring the claim of Hannah S. Crane and others to the Court of Claims.

"*Be it enacted, etc.*, That jurisdiction be, and the same is hereby, conferred on the Court of Claims to hear the claim of Hannah S. Crane and others for the value of certain real property in the City of San Francisco, in the State of California, in which they claim an undivided one-sixth interest, upon the evidence already filed in said court and such additional legal evidence as may be hereafter

presented on either side; and if said court shall find that said parties acquired a valid title to said real property as claimed, said court shall award the said parties the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States. And before receiving the same, all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property, and any defense, set-off, or counterclaim may be pleaded by the United States, as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

"Approved February 25, 1905."

The case originally came before the Court of Claims by reference from a committee of Congress under section one of the act of March 3, 1883, commonly known as the "Bowman Act," 22 Stat. L. 485. The court made findings (Rec. pp. 2–17) similar in all essential particulars to those made in the present proceeding (Rec. pp. 18–38). These findings were certified to Congress as required by that act, in 1896 (Rec. p. 2). Thereafter, in 1905, Congress passed the special act, above quoted, under which the present suit was instituted.

The facts as found by the Court of Claims in this case (Rec. 18–38), somewhat abbreviated, are as follows:

The act of July 3, 1852 (10 Stat. L. 11) to establish a branch of the mint of the United States in California, authorized the Secretary of the Treasury to make a contract for the erection of the building and procuring the machinery necessary for the operation of the mint at a sum not exceeding $300,000 (Finding I, p. 18).

A contract for the erection and equipment of the mint at San Francisco was made with Joseph R. Curtis April 15, 1853. By this contract Curtis agreed to erect the building and furnish all the requisite machinery, fixtures and tools for the branch mint and to convey the whole

property to the United States, he to receive for the same the sum of $239,900, which was to be compensation in full for the said lot, building and machinery. Curtis was to submit the title of the lot to the Attorney of the United States for the Eastern [Northern?] District of California, who was to report the same to the Attorney-General of the United States for his opinion and the title was to be made good to the satisfaction of the Attorney-General.

A larger lot being found to be necessary, the Secretary of the Treasury made a supplemental contract with said Curtis on July 6, 1853, for the purchase and improvement of an adjoining lot.

The lot named in the original contract, above set forth, had on it a substantial brick building, erected in the year 1851, which was, prior to April 15, 1853, used as an assaying office, and was authorized, under the provisions of the act of September 30, 1850 (9 Stat. L., top of p. 531), to assay gold and form the same into bars, and also coined and issued gold coins, being the principal assaying office on the Pacific coast. Under said contract of April 15, 1853, and the supplemental contract of July 6, 1853, the required alterations and improvements were made and the building accepted by the Secretary of the Treasury for the branch mint of the United States. The machinery and fixtures formerly in use in the assaying office were transferred to the new mint, with some additional machinery required to fit it up for that purpose.

On May 2, 1854, said Joseph R. Curtis made and executed a deed conveying both lots to the United States. The Attorney-General approved the title and the said deed.

The sum of $239,900 was paid to said Curtis as a total compensation for the lot and the improvements required to be placed thereon by the original contract. He was also

paid the sums named in the supplemental contract for the value of the adjoining lot and the improvements placed thereon.

The United States forthwith went into possession, and used the property as the branch mint of the United States, and has been in possession ever since.

Prior to the time of the making of the contract first above set forth, April 15, 1853, the lot named in the original contract had been owned in fee simple by, and was in possession of, Curtis, Perry & Ward, a firm composed of the aforesaid Joseph R. Curtis, Philo H. Perry and Samuel H. Ward.

On the 22d day of March, 1853, Samuel H. Ward died at sea, while on a voyage to the Sandwich Islands. His death, however, was not known at San Francisco till the 21st of April, 1853. At the time, therefore, when Curtis entered into the contract of April 15, 1853, he did not know of his partner's death, and as he was dealing with partnership property made the contract for the benefit of the firm.

Ward left a will appointing his partners, Joseph R. Curtis and Philo H. Perry, his executors. Said will was proved and allowed in the Probate Court of the city and county of San Francisco, and Philo H. Perry alone qualified as executor thereunder.

After the said will was probated, to wit, on the 23d day of August, 1853, the estate of said Ward was appraised by a duly constituted board of appraisers, and the value of the whole lot named in said contract of April 15, 1853, was fixed by them at $40,000.

After said appraisement, to wit, on the 29th day of August, 1853, said Perry, as such executor, made and executed a deed purporting to convey to said Curtis all the interest in the lot named in the contract of April 15, 1853, of which said Ward had died, seized and possessed, and received in payment therefor the sum of $13,333.33.

By the terms of the said will of said Ward, nine-tenths of his estate was bequeathed to his wife, Emily H. S. Ward; and her proportion of the above-named $13,333.33 was duly paid to her by the said executor and accepted by her with full knowledge of the said sale of Perry, as executor, to Curtis, but in ignorance of the extent of her estate in the land in dispute, as shown by the decision of the Supreme Court of California (*King* v. *La Grange*, 50 California, 358; 61 California, 221). The conveyance made by said Perry and Curtis was in pursuance of the power and authority granted to said Perry, executor aforesaid, by the terms and provisions of the last will and testament of said Ward.

On the 18th day of March, 1854, Emily H. S. Ward, together with her colegatees under the will of Samuel H. Ward, filed in the District Court of the United States for the Northern District of California a bill in equity against the said Curtis and Perry. Portions of this bill are quoted in the findings (pp. 22–24). It charges that the contract for building the branch mint, though made in the name of the defendant, Joseph R. Curtis, was in truth and in fact for the copartnership firm of Curtis, Perry & Ward; that Perry, as executor of Ward, conveyed his testator's interest in the lot and building for the sum of $13,333 to the defendant, Joseph R. Curtis, and that Perry's object in this transaction was to deprive the legatees under the will of Ward of their just and legal right to participate in the profits of the sales to the United States; that the sum paid for the property by the defendant Curtis was greatly under the value thereof, in view of the profits arising from the sale of the same property to the United States; and that by virtue of this pretended sale by Perry to Curtis, they dealt with the partnership property of Curtis, Perry & Ward for their individual gain and advantage and were thereby colluding to defraud

the plaintiff, Mrs. Ward, of her just share and proportion of the purchase money.

The object of the bill was to obtain for Mrs. Ward and her colegatees under the will of her husband the full benefit jointly with the other partners, of Curtis's contract with the United States.

On March 31, 1854, the said Emily H. S. Ward, through her counsel of record, notified the Secretary of the Treasury of the filing of the said bill, by letter enclosing copy of same. Prior to the receipt of this letter the United States had already paid said Curtis the sum of $100,000. Afterwards, on May 4, 1854, the United States paid him $150,000; and on June 13, 1854, $33,929.10 upon the contract for the erection of the building and machinery.

The bill was, in June, 1854, dismissed by complainant's counsel of record.

In 1855 Perry filed in the Supreme Court of New York a petition in which Mrs. Ward and other *cestuis que trustent* of Ward's will joined, setting forth in detail his management of Ward's estate, including the disposition of all the real estate here involved, with copy of Ward's will annexed, which, after reference to a referee for authentication, was approved and the executor discharged.

In 1865 Mrs. Ward conveyed all her interest in the land to one James L. King. In 1867 said King instituted an action of ejectment in the District Court of the fifteenth judicial district of the State of California, in and for the city and county of San Francisco, against Robert B. Swain to recover possession of one undivided sixth part of the lot named in said first contract.

Said Swain, the defendant in the action, was superintendent of the United States branch mint at San Francisco, and was in possession of the lot and building in that capacity only, claiming no title in himself.

He remained such superintendent, and in possession of the property for some considerable time afterwards, and until his death, and the suit being still pending at his death, on suggestion thereof, and on motion of the plaintiff, the suit was continued by order of the court against his successor, O. H. La Grange, who, as such superintendent, took possession of and occupied the premises for and on behalf of the United States.

Throughout the suit the United States district attorney by direction of the Secretary of the Treasury and the Attorney-General appeared on behalf of the United States for the defendant and conducted the defense.

The case was twice before the Supreme Court of California, first upon appeal from the judgment of the trial court deciding the case in favor of defendant on the ground of acquiescence by Ward's widow in the distribution of his estate, as to which the Supreme Court of the State decided that there was no waiver or acquiescence on her part; and again upon appeal by the defendant from a judgment entered by the trial court, August 15, 1878, in favor of the plaintiff. On this second appeal the question of acquiescence and waiver by Mrs. Ward of her rights was reconsidered, and it is held that there was no waiver, acquiescence or ratification of any disposition of her community interest in the property.

An additional defense was also considered by that court as to whether the fact that the defendant was in possession only in the capacity of superintendent of the United States branch mint, protected him from suit. The court held that it did not, and affirmed the judgment, August 15, 1882. Copies of the opinions of the Supreme Court of California are annexed as an appendix to this brief, *post*, pp. 22–34.

A writ of error was then obtained from the Supreme Court of the United States to said Supreme Court of

California, but said writ of error was on the 5th day of May, 1884, dismissed.

The order of dismissal, as will appear by inspection of the files of this court, was as follows:

"SUPREME COURT OF THE UNITED STATES.
"No. 632. October Term, 1883.

"O. H. La Grange, Plaintiff in Error, *v.* James L. King.
"In Error to the Supreme Court of the State of California.

"This cause came on to be heard on the transcript of the record from the Supreme Court of the State of California, and on the motion of Mr. Assistant Attorney-General Maury, of counsel for the plaintiff in error, It is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby, dismissed with costs.
"May 5th, 1884."

The claimants in this case are vested by mesne conveyances with all the title of Mrs. Emily H. S. Ward and of James L. King, the plaintiff in the ejectment suit in the courts of California. The conveyances are given in full in Finding V, pp. 31–36.

Since the date of the judgment in the Court of Claims and of the appeal therefrom, two of the claimants, Hannah S. Crane and James T. Boyd, have died; and their legal representatives were, May 15th, 1911, on motion, duly substituted in this court as appellants.

The findings contain (Finding VI, pp. 36, 37), the appraisement of the estate of Samuel H. Ward.

They conclude (Finding VII, p. 38) with the statement that the value of the undivided one-sixth interest of Emily H. S. Ward, widow of Samuel H. Ward, in the property in suit was at the time possession was taken by the United States, $6,666.66.

The Court of Claims held on these findings that the

judgment of the Supreme Court of California upholding the title upon which the present claim was based was not conclusive; that Mrs. Ward acquiesced in the sale of the property by Curtis and Perry to the Government and that neither she nor her grantees had any title upon which a claim can be based. The court, therefore, dismissed the petition. The opinion is by Judge Booth (pp. 38–44) and is reported 44 C. Cls. 324. The claimants appealed to this court (p. 74).

II. Assignment of Error.

The appellants hereby assign for error that the court below decided adversely to the title claimed by them in the property named in the special act of Congress of February 25, 1905 (Rec. p. 40) and therefore gave judgment for the defendant; whereas, said court should have sustained the title set up by the appellants and should have given judgment in their favor, as required by said act of February 25, 1905, for "the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States."

III. Brief of Argument.

Decision California Supreme Court Conclusive.

The principal complaint which we make of the action of the Court of Claims adverse to this claim is of its failure to give effect to the judgment of the Supreme Court of California, which upheld the title of Mrs. Ward, upon which this claim is based. It is found as a fact with regard to the protracted litigation in the courts of California, which lasted from 1867 to 1884, that "throughout the suit the United States District Attorney, by direction of the Secretary of the Treasury and the Attorney-General, appeared on behalf of the United States for the defendant and conducted the defense" (Rec. p. 31). A

writ of error was obtained to bring the case to this court and it remained pending here for some time, when it was dismissed on motion of the Assistant Attorney-General of the United States. It thereby became final.

If there is any subject upon which the judgments of the courts of the several States are conclusive, it is that of title to real property.

In the case of *Warburton* v. *White*, 176 U. S. 484, it was strongly insisted, as it is here (p. 495), "that the decisions in question do not, therefore, relieve this court of the duty of interpreting for itself, as a matter of first impression, the laws of the Territory or of the State of Washington which are here involved, and upon the faith of which, it is asserted, the obligations arising from the contract took being." But the court (opinion by the present Chief Justice) answered this argument (pp. 495, 496):

"Whilst abstractly considered the proposition is conceded, it is not apposite to the controversy here presented. The rule is subject to a limitation, which is, that where state decisions have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature; in other words, where the state decisions establish a rule of property, this court when called upon to interpret the state law will, if it is possible to do so, in the discharge of its duty, adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the State, and thus conform to the rule of property within the State. It is undoubted that this rule obtains, even although the decisions of the state court, from which the rule of property arises, may have been for the first time announced subsequent to the period when a particular contract was entered into. *Burgess* v. *Seligman*, 107 U. S. 20, 34; *Miller* v. *Ammon*, 145 U. S. 421, 423.

"Applying the principle just stated to the case before us, we feel no hesitation in construing the contract of pur-

chase, which is here in question, in accordance with the nature and extent of community property, as settled by the decisions of the Supreme Court of Washington, interpreting the laws which were in existence when the purchase was made. Obviously, the reasoning of the plaintiff in error, upon which the assumption that community property bought during the existence of the act of 1873 was solely the property of the husband, involves not only a contradiction in terms but invokes at the hands of this court, in order to overthrow the rule of property in the State of Washington, an interpretation of the statutes of that State which is not only confusing, but self-destructive."

And this view was reaffirmed in *Clarke* v. *Clarke*, 178 U. S. 186.

In the present case the circumstances render it most inequitable to apply any other rule than that of following the judgment of the State court. The value fixed for this property between Curtis and the Government was $239,900. Only $100,000 of this amount had been paid to Curtis at the time Mrs. Ward complained, by her bill in equity, of being defrauded through the action of Ward's partners, Curtis and Perry. The Secretary of the Treasury was promptly notified of the filing of the bill of complaint March 31, 1854 (end of Finding II, p. 8). Yet in the face of this notice that officer proceeded to pay Curtis the entire balance under the contract.

In the case of *United States* v. *Borcherling*, 185 U. S. 223, it was held that where the Secretary of the Treasury, with notice of the claim of one party to a fund, pays it to another the Government is liable to make a second payment to the other claimant, if he can satisfactorily establish his title thereto.

In 1867, James L. King, who had succeeded to the rights of Mrs. Ward, began his suit against the superin-

tendent of the branch mint, who was in possession of the property. The superintendent of the mint was defended throughout that suit by the law officers of the United States acting under direction of the Secretary of the Treasury and the Attorney-General. The litigation was most protracted, going twice to the Supreme Court of California. That court considered most carefully every point arising under the law of that State. Its final judgment was in favor of the plaintiff. The case was brought by writ of error to this court. The writ of error was, on May 5, 1884, voluntarily dismissed by the Assistant Attorney-General of the United States representing the plaintiff in error, the officer of the Government in possession.

The title has thus been sustained in an elaborately contested suit in ejectment against the officers of the United States in possession. That suit was of a similar character to the one brought by the heirs of General Robert E. Lee against the officers of the United States in possession of the Arlington estate, *United States* v. *Lee*, 106 U. S. 196, affirming the judgment of the Circuit Court, 15 Federal Cases, Nos. 8191, 8192, pp. 162, 204. Subsequently to the decision in the *Lee* case, Congress made an appropriation to purchase the outstanding title (22 Stat. L. 584). The relief which Congress has attempted by the act in the present case to grant is similar in effect to that granted the heirs of General Lee. The present appellants or their predecessor in interest ought not to be prejudiced because instead of seeking to be put in possession by a writ of ejectment, they followed the more reasonable and orderly course of an appeal to Congress, followed by the passage of an act which requires only that they shall show that they "acquired a valid title to said real property as claimed" and shall establish the value of their interest.

Construction of Special Act 1905.

To the proper construction of the special act of 1905, it is necessary to bear in mind that it was passed in full view of substantially all the facts now before the court. The case had once already been before the Court of Claims and the court had reported to Congress the findings contained in the record, pp. 2–17.

It is hardly to be supposed that with all these facts before it Congress referred the case to the Court of Claims in order to enable that court to review the reasoning of the Supreme Court of California. The more reasonable construction of its action is that the case was referred to the Court of Claims for the purpose of ascertaining the reasonable value of the property—a question which the former findings had left indefinite—and of awarding it to the claimants, if they were found to have succeeded to the title of James L. King, which had been sustained by the Supreme Court of California.

The question is similar in principle to that considered by this court in *Roberts* v. *United States*, 92 U. S. 41, 49, where a private act referring a case to the Court of Claims was construed by this court in the light of the circumstances which must have been within the knowledge of Congress when it passed the act. The court said, p. 49:

"It is true that Congress did not determine, in express terms, that the parties were entitled to any compensation, but referred it to the court to decide 'whether any, and, if any, what amount is due.' Still we think it is plain that Congress principally intended to refer to the adjudication of the Court of Claims the amount of compensation to which the claimants were entitled, and for that purpose prescribed the principle by which it should be estimated, but even if it was intended to refer the whole subject, the right to compensation, as well as the amount, the claimants, under the circumstances of the case, are, in our judgment, entitled to compensation."

Following this decision of this court, the Court of Claims held, in *Dahlgren* v. *United States*, 16 C. Cls. 30, par. 1 of syllabus, p. 31:

"Where the government has a special defense to a claim, and the facts constituting the defense are well known to Congress, it is unreasonable to suppose that Congress would refer the claim to this court with the intent that the special defense should be set up and the claim defeated thereby."

Or, as stated in the opinion, in words applicable to this case, p. 50:

"If Congress had intended to set this defense up, it is more reasonable to suppose that it would have done so itself rather than put the claimant to the cost of a suit in order to have it set up here."

This case was cited by the Court of Claims in a recent elaborately considered case as authority for the position that "technical defenses known to Congress must be deemed waived," *Ayres* v. *United States*, 44 C. Cls. 110, 124.

And a similar line of reasoning as to the construction of a special act governed the recent decision of this court in *Parish* v. *MacVeagh*, 214 U. S. 124.

CARR *v.* UNITED STATES, 98 U. S. 433.

Much stress is laid in the opinion of the Court of Claims upon the case of *Carr* v. *United States*, 98 U. S. 433, as establishing the proposition that the Government is not estopped by the recovery of judgment in ejectment in a State court even though the United States District Attorney took part in the defense. The decision in the *Carr* case was materially qualified by the later decision in *United States* v. *Lee*, 106 U. S. 196. In that case, this court in the passage quoted in the record top of p. 41, and in a subsequent sentence not quoted, suggests four alternatives which the Government may take if dissatisfied

with the judgment of the State court in a suit in ejectment against one of its officers. We quote from 106 U. S. 222, without change of language or punctuation, but paragraphing and numbering the alternatives for convenience:

"Hence, taking the present case as an illustration—

"(1) The United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained.

"(2) Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff, and the present plaintiff as defendant, the title of the United States could be judicially determined.

"(3) Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation,

"(4) Or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution."

The Government has certainly not adopted the first or second of these alternatives or anything similar. In the *Lee* case itself, it adopted the third alternative and purchased the property by fair negotiation, for which purpose Congress appropriated $150,000 by the Deficiency Act of March 3, 1883, 22 Statutes at Large, 584. In the present case, while no one of the four alternatives has been literally pursued, the course adopted more nearly approximates the fourth alternative. It is analogous to a condemnation by a judicial proceeding in which a just compensation should be ascertained and paid according to the Constitution. Moreover, the suits against the officers in possession referred to in the *Carr* case were before inferior State courts in which there was no attempt to obtain the judgment of a United States court on the validity of the title of the plaintiffs.

In the present case, the litigation not only went up to the highest court of California, but also came by writ of error to this court, and was here dismissed on motion of the Assistant Attorney-General, evidently because it was thought by the Department of Justice that the title of the United States could not be sustained. It would be turning the act of relief in this case into a mockery to hold that after Congress has with full knowledge of the facts referred the case to this court, the Government can successfully plead a defense well known to Congress when it enacted the jurisdictional statute.

In view of the position taken by the Court of Claims that the judgment of the Supreme Court of California is not conclusive, we annex, as an appendix to this brief, the full text of the opinions of that court copied from the 50th California Reports, p. 328, and 61st California Reports, p. 221, and rely upon the reasoning of that court even if it be held that the decisions there made are not absolute authority.

No Estoppel or Acquiescence.

What are the facts which are claimed to constitute the acquiescence of Mrs. Ward in the unauthorized disposition of her community interest? The partnership property which the Government had agreed to buy for $239,900 was appraised by the board of appraisers at about one-sixth of that sum or $40,000. The one-third interest of Ward was thus valued at $13,333.33. This amount his executor received and paid her the proportion thereof which Ward had bequeathed her of his estate. Upon learning the fraud practiced upon her Mrs. Ward filed a bill in equity against the executor of her husband who was also one of his partners and against the other partner, Curtis, claiming the full benefit of Curtis's contract with the United States, and notified the Secretary of the Treasury

of the filing of the bill. With full notice of the filing of this bill, the Secretary of the Treasury paid the full amount of the purchase money to Curtis. Afterwards the bill was dismissed by Mrs. Ward's counsel. The executor of Ward's estate presented his account which was approved and the executor discharged.

In all this proceeding, it is found by the Court of Claims that Mrs. Ward was (Finding foot p. 21 of record, *ante*, p. 5) "in ignorance of the extent of her estate in the land in dispute." Nowhere was there any pretense of purchasing her community interest in the property or of giving her anything but what she was entitled to out of Ward's interest in accordance with the terms of his will. Between the action of her deceased husband's two partners, one of whom was also his executor, in dealing with partnership property for their own interest, and that of the Secretary of the Treasury in ignoring her community rights, she was absolutely helpless. She accepted the situation thus created so far as it related to the interest of her late husband and her share as a distributee under his will, but nowhere did she consciously part with her community right as a wife in his property or give up such right as his widow.

The fact is not to be overlooked that, as appeared directly in the proceedings in California and inferentially in the findings here, "Mrs. Ward never resided in California, but was a resident of Middletown, Connecticut" (*post*, p. 23). This constitutes an additional reason to show how inequitable it would be to hold that in some unexplained manner, she gave up her community rights arising under a system of law under which she had never lived.

In the recent case of *Arnett* v. *Reade*, 220 U. S. 311, this court has had occasion to consider the nature of community property in jurisdictions governed by the civil law. The elaborate citations made in the argument for

the appellants, pp. 311–314, show that the community interest of the wife is a real interest of her own of which the husband has no power to divest her, either by deed, or by will. This view received the approval of this court in the decision.

There is no evidence anywhere in the record of any acquiescence by Mrs. Ward in the attempt to dispose of her community property.

In *Brant* v. *Virginia Coal & Iron Co.* 93 U. S. 326, it was said with reference to this question of equitable estoppel, pp. 335, 336:

"There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title, inconsistent with the fact; but, on the contrary, it is abundantly established by the evidence in the record, that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company in 1854, they always claimed to own seven-eighths of the reservation. The assignment itself recited that the widow had owned, and had sold to that company, a life-interest in the property, and that they had acquired the interest of the heirs.

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only that there must be positive fraud or concealment, or negli-

gence so gross as to amount to constructive fraud.' 1 Story's Eq. 391. To the same purport is the language of the adjudged cases. Thus it is said by the Supreme Court of Pennsylvania, that 'the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up.' *Hill* v. *Eppley*, 31 Penn. St. 334; *Henshaw* v. *Bissell*, 18 Wall. 271; *Biddle Boggs* v. *Merced Mining Company*, 14 Cal. 368; *Davis* v. *Davis*, 26 Id. 23; *Commonwealth* v. *Moltz*, 10 Barr, 531; *Copeland* v. *Copeland*, 28 Me. 539; *Delaplaine* v. *Hitchcock*, 6 Hill. 616; *Havis* v. *Marchant*, 1 Curt. C. C. 136; *Zuchtmann* v. *Robert*, 109 Mass 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established."

And again, p. 337:

"It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Crest* v. *Jack*, 3 Watts, 240; *Knouff* v. *Thompson*, 4 Harris, 361.

"Tested by these views, the defense of estoppel set up in this case entirely fails."

And again in *Crary* v. *Dye*, 208 U. S. 515, 521, the court, by Mr. Justice McKenna, said:

"2. The principle of estoppel is well settled. It pre-

cludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326; *Hobbs* v. *McLean*, 117 U. S. 567. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In *Dotson* v. *Merritt* (Kentucky, 1910), 132 Southwestern Reporter, 181, it was decided:

"Where a husband did not know that he had any right by curtesy in lands sold by his children after his wife's death, but believed that they owned the land and was not present at the sale, he was not estopped from afterwards asserting his rights by curtesy against the purchaser."

According to these authorities, there can be no estoppel against Mrs. Ward or her grantees arising out of anything done in this case.

Conclusion.

It is submitted that the judgment of the Court of Claims adverse to this claim should be reversed.

If this is done, the question of value certainly requires further consideration. The contract of Curtis with the Government calls for a payment of $239,900 and the record shows that that amount was paid. The value of Mrs. Ward's undivided one-sixth interest is found by the Court of Claims to be only $6,666.66 (Finding VII, p.

38). The discrepancy between these two amounts is so great that it seems evident that some mistake has been made in fixing this small amount as the value of Mrs. Ward's interest in the property.

GEORGE A. KING,
Attorney for Appellants.

APPENDIX.

50 CALIFORNIA, 328.

(No. 4385.)

James L. King v. *O. H. La Grange.*

Will of Husband Devising Community Property.—If a married man, by will, devises his real estate to his wife, and the same is community property, and there is nothing on the face of the will to show that he intends to devise more than the undivided half which is subject to his testamentary disposition, and, after the death of the testator, the executor, under a power of sale in the will, and in ignorance of the law which allows the wife to inherit one-half of the community property, sells and conveys the right of the testator to all the land, and the purchaser, also in ignorance of the law, supposes he is buying the entire property, and the wife, also in ignorance of the law, receives the purchase money, she does not thereby waive her right to the undivided half of the property which the statute permits her to inherit.

Idem.—In such case there is no alternative by which the widow is required to elect whether she will take under the will, or repudiate it and claim her inheritance under the statute.

Election or Ratification.—The essence of either an election or ratification is, that it was done with full knowledge of the party's right.

Appeal from the District Court, Fifteenth Judicial District, City and County of San Francisco.

Ejectment to recover an undivided one-sixth of a lot in San Francisco, sixty feet by sixty, on the north line of Commercial street, between Montgomery and Kearney streets.

The lot was purchased by the firm of Curtis, Perry & Ward, prior to the year 1853, and was held by them as tenants in common at the time of the death (March 22, 1853) of Samuel H. Ward, a member of the firm.

At the time of its purchase, Emily H. S. Ward was the wife of Samuel H., and survived him. The lot was community property.

Ward left a will, by which he appointed his partners, Curtis and Perry, his executors, "with full power to manage, sell, dispose of, and control all my estate, real, personal and mixed, in such manner as to them shall seem meet, and as I might do if living." Curtis failed to qualify and Perry became the sole executor.

The will was probated in the Probate Court of San Francisco, on the 18th day of August, 1853. Subsequently, on the 29th of August, 1853, Perry, under the power vested in him by the will, in consideration of $13,333.33, sold and conveyed to Joseph R. Curtis, all the right, title and interest of said Ward in the lot of land in question. Afterwards, in 1854, Curtis sold and conveyed the lands to James Guthrie, Secretary of the Treasury, on account of the United States, and the premises have been since used as a branch mint.

Mrs. Ward, as the undivided one-third part of the lot was community property, claimed that the will operated only upon the undivided one-half of this one-third, and that she continued to be the owner of the remaining one-half, and by her attorney in fact, Henry W. Starr, conveyed her interest in the property, in 1865, to the plaintiff.

Mrs. Ward never resided in California, but was a resident of Middletown, Connecticut.

The sale of the one-third of the lot to Curtis, and the price received for it, was known to Mrs. Ward, and to her brother, said Henry W. Starr, who was in California at the time of the sale, and Mrs. Ward received nine-tenths, and Mrs. Verner one-tenth of such price, without objection by Mrs. Ward.

The executor's accounts were filed in the Probate Court.

The sale of the executor to Curtis was made before it had been determined in this State, by judicial decision, that the provision of the statutes of April 17, 1850, giving to the husband the "absolute power to dispose of" the common property of husband and wife, did not extend to disposal by will. By the law, therefore, Mrs. Ward inherited an undivided half of the demanded premises.

The defendant was superintendent of the mint. The court below rendered judgment for the defendant, and the plaintiff appealed.

Crane and Boyd for the appellant.

L. D. Latimer for the respondent.

By the court:

The will of Samuel H. Ward, deceased, purports to devise an undivided one-tenth of his real estate to his sister, Mrs. Verner, and all the rest and residue thereof to his wife, from whom the plaintiff deraigns his title. There is nothing on the face of the will to indicate that the testator attempted to devise property of which he had not the disposition, nor does the deed executed by Philo H. Perry, executor, under the power in the will, purport to convey any other estate than "the right, title and interest" of the testator in the property described in the complaint. There was, therefore, no alternative upon which the election of the widow could be exercised. If, in ignorance of the law, the executor supposed he was selling, and the purchaser supposed he was buying a larger interest than belonged to the estate, it was the misfortune of the latter. There is nothing in the record to show that the widow was better informed than they when she accepted her portion of the proceeds of the sale. If ignorance or mistake of law should enlarge the estate transferred by the executor's deed, it should excuse her, for the very essence either of an election or ratification is, that it is done advisedly, with full knowledge of the party's rights.

It is said, that if the wife intended to insist upon her right to one-half of the common property, she should have repudiated the provisions in the will in her favor. But the deceased had full right to dispose of his own half of the community property, and, as the case is presented, two circumstances are lacking in the proofs: First. That he attempted to dispose of more; and, second, that she knowingly performed an act indicating, or which could be construed to be, a waiver of her rights under the will. The devise must be read as applying only to the estate within his power of testamentary disposition. As was said in the *Estate of Silvey*, "a purpose to attempt the disposition, by will, of property which, by statute, would pass to the wife, as survivor of the matrimonial community immediately upon his death, is not to be readily inferred, especially where, as here, the words

employed by the testators may have their fair and natural import by applying them to that of which he had, by law, the testamentary disposition." (42 Cal. 213.)

Order reversed.

61 CALIFORNIA, 221.

(No. 6555.—In Bank.)

August 15, 1882.

James L. King v. *O. H. La Grange.*

Ejectment Against United States Officer—Jurisdiction. —Ejectment will lie against an officer of the United States in possession of the demanded premises on behalf of the Government.

Id.—Id.—Case Distinguished—Dictum.—*Carr* v. *The United States*, 98 U. S. 433, distinguished and the dictum in that case disapproved.

Id.—Law of the Case.—The case is not materially varied from the case presented on the former appeal (50 Cal. 328), and the decision on that appeal is therefore the law of the case.

Id.—Devise of Community Property—Waiver—Estoppel in Pais.—W. being the owner of an undivided one-third of the land in controversy as community property (his co-tenants being P. and C.), devised and bequeathed an undivided one-tenth of all his estate, real, personal and mixed, to V., and all the rest and residue of his estate, real, personal, and mixed, to his wife. After W.'s death, P.—who by the will had been appointed executor with power of sale—sold and conveyed to C. all the right, title and interest of W. in the said land, Mrs. W. upon a settlement with the executor receiving her share of the proceeds. Afterwards C. sold to the Government for a largely advanced price. Mrs. W. conveyed all her right, title and interest in the land to the plaintiff, who brought this action against S., then in possession of the land as Superintendent of the United States Branch Mint; and S. dying pending the action, the present defendant, his successor in office, was by an order of the court substituted in the action as his successor in interest. Upon a former trial judgment was rendered for the defendant,

but, on appeal from an order denying a new trial on the ground that the evidence was insufficient to justify the decision of the court, the order was reversed. Upon a second trial no new evidence was introduced, except a bill in chancery filed by Mrs. W. (the plaintiff's grantor), and her co-legatee in the United States District Court for California, against P. and C. to set aside the sale from the former to the latter, and to compel them to pay over to her one-third of the price received from the Government. A letter from M. and W. (the solicitors of her co-legatee in that action), to the Secretary of the Treasury inclosing a copy of the bill, was offered in evidence but excluded by the court. The judgment was for the plaintiff.

Held: It was held on the former appeal that the evidence was insufficient to support a finding that the deceased intended to dispose of more than his own half of the community property, or that his widow knowingly performed any act which could be construed to be a waiver of her rights. Upon the former question the evidence on the last trial was the same as upon the first, and the question is no longer an open question in this case. Upon the latter question the only additional evidence is the bill in chancery, and there is nothing in that which tends to prove a ratification of the conveyance of her interest in the community property, which it is claimed the executor attempted to convey.

Id.—*Res Inter Alios Acta* Evidence.—The ruling of the court in excluding the letter of M. and W. was correct. It was clearly *res inter alios acta*.

Id.—Law of the Case.—Substitution of Parties.—The objection that the court had not the power upon the death of S. to continue the action against the present defendant comes too late.

Appeal from an order denying defendant's motion for a new trial in the Fifteenth District Court of the City and County of San Francisco. Dwinelle, J.

The main facts of the case are stated in the report of the former appeal (50 Cal. 328). The material parts of the will were as follows:

"I, Samuel Ward, etc. * * * do hereby nominate and appoint my partners, Joseph R. Curtis and Philo H. Perry, the executors of this, my last will and testament, with full power to manage, sell, dispose of, and control all my estate, real, personal and mixed, in such manner as to them shall seem meet, and as I might do if living, subject to the grants hereinafter made, and in case of the death, absence, or inability of either to act, then the remaining one is to be my sole executor, with full and complete power to act in the premises.

"I do hereby further will and direct that my interest in the assaying office at San Francisco shall remain unchanged, so long as the said Perry and Curtis shall continue to be the contractors for the Government assaying, and that my executors shall continue to manage the same precisely as if I am present, it being my express will that while they continue in said assay office that my interest should remain wholly unchanged.

"I do further give, devise, bequeath and dispose of to my sister, if she be now living, Maria N. Verner, of Pittsburg, and to her heirs, the one undivided one-tenth of all my estate, real, personal and mixed, and charge my executors with the execution of this wish, subject, however to the previous and foregoing portion of this my will.

"I do further give, devise, bequeath, convey and dispose all the rest and residue of my estate, real, personal and mixed, and the rents, issues and profits thereof, to my wife, now living at Middletown, Connecticut." * * *

The deed from Perry to Curtis, was as follows:

"This deed witnesseth that Philo H. Perry, under the power vested in him by the will of Samuel H. Ward, late of San Francisco, has, in consideration of the sum of thirteen thousand three hundred dollars and thirty-three cents paid to him, said Perry, as executor, has bargained and sold, and now bargains, sells and conveys, to Joseph R. Curtis, of the City and County of New York, and to his heirs forever, all the right, title and interest of said Ward in the parcel of land situate in the City of San Francisco." (Here follows description of land, etc.)

The writers of the letter referred to in the opinion,

Magraw & Wills, were attorneys of the co-plaintiffs of Mrs. Ward, who appeared by different counsel.

L. D. Latimer and William W. Morrow for appellant.

Cope & Boyd for respondent.

Sharpstein, J.:

This is an action of ejectment, and the complaint is in the ordinary form. One of the defenses set out in the answer of the defendant is, "that at the time of the commencement of this action, he was Superintendent of the United States Branch Mint, situated on the lot of land described in the complaint, * * * and as such and not otherwise, he was in possession of said lot for the United States, and not for himself, and that he never had or claimed to have any interest therein as owner, tenant or otherwise, and that from 1854, down to the present time, the United States has continuously been, and still is, the owner in fee and in the sole and exclusive possession of said lot, and every part thereof."

It is not claimed, and could not successfully be claimed, that by the interposition of this plea the court was ousted of jurisdiction to proceed further in the action. But an issue was raised which the court was bound to try the same as any other issue in the case. If the facts alleged turned out to be true, they would constitute a defense to the action. Otherwise, not. As to some of those facts, there was no controversy. The plaintiff admitted "that since May, 1854, the Government of the United States has claimed title to the premises in dispute, and that since said time said premises have been in the exclusive, open and notorious possession of the successive Superintendents of said Branch Mint, as the officers of and in behalf of the United States," under a deed from one Curtis to James Guthrie, Secretary of the Treasury.

It was not admitted that the Government of the United States was ever at any time the owner in fee of said lot or that the Government was ever in possession of it, unless the possession of the defendant was the possession of the Government. But it is insisted that the admission shows that he was not in *possession* of the demanded premises

within the meaning of that term as used in the law of ejectment, and that therefore the judgment is erroneous.

The precise question arose in *Polack* v. *Mansfield*, 44 Cal. 36, and it was there held that the action of ejectment would lie against an officer of the United States in possession of the demanded premises for the purposes of a military camp or fortification under the direction of the Secretary of War or of the President of the United States. In support of this the court cited *Meigs* v. *M'Cluny's Lessee*, 9 Cranch, 11, in which the court said: "The land is certainly the property of the plaintiff below, and the United States can not have intended to deprive him of it by violence, and without compensation. This court is unanimously and clearly of opinion that the Circuit Court committed no error in instructing the jury that the Indian title was extinguished to the land in controversy, *and that the plaintiff below might sustain his action.*" And *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, in which Chief Justice Marshall, delivering the opinion of the court used the following language: "It may, we think, be laid down as a rule, *which admits of no exception*, that in all cases where jurisdiction depends on the party, it is the party named in the record. Where the right is in the plaintiff and the possession is in the defendant, the injury can not be stopped by the mere assertion of title in a sovereign." Also, *McConnell* v. *Wilcox*, 1 Scammon, 344, in which the Supreme Court of Illinois held that the defense that ejectment would not lie because the occupant of the demanded premises was an officer of the United States, and in possession as such officer, and not otherwise, could "not be tolerated for a moment."

Osborn v. *The Bank of the United States*, *supra*, is cited in *Davis* v. *Gray*, 16 Wall. 220, in which the court says that it was decided in the former case that: "In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest."

In *Swasey* v. *North Carolina Railroad Company*, 1 Hughes, 17, Chief Justice Waite says: "Since the case of *Osborn* v. *The Bank of the United States*, it has been

the uniform practice of the courts of the United States to take jurisdiction of cases affecting the property of a State in the hands of its agents, without making the State a party, where the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent."

These, and *Brown* v. *Huger*, 21 How. 305; *Cooley* v. *O'Connor*, 12 Wall. 391; and *Grisar* v. *McDowell*, 6 Id. 363, preceded the case of *Carr* v. *United States*, 98 U. S. 433. The question which the court had to decide in the latter case was whether the United States would be concluded by a judgment recovered in an action of ejectment against a mere officer of the Government holding possession of the demanded premises solely by virtue of his office. The court held that the Government was not estopped by that judgment from maintaining an action to quiet its title to the premises in controversy. But the court did not treat the judgment recovered in ejectment as void. It did not say that the Government was entitled to have its title quieted because it claimed the land and was in possession of it by its officers or agents when the action of ejectment was commenced. But the court went fully into the question of title, and held that the Government had a valid title to the land, and was not estopped from asserting it by a judgment rendered in an action to which it was not, and could not be made, a party without its express consent.

In one part of the opinion the court did say: "If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post-office or a custom house, a prison or a fortification." But that was entirely outside of the case which the court had before it. As before stated, the only question which the court had before it was, whether the judgment rendered against an agent or officer of the Government in a case like this would be a bar to an action by the Government to recover the same property from the party who had recovered it in the action against said agent or officer. And since the Government can not be sued without its consent, but can maintain an action against any one else whether he consents or not, it would seem to result from the doctrine

laid down in that case that a person who claims title to land in the possession of the United States can not have his title finally determined in any other way than by bringing an action of ejectment against the officer in possession of the demanded premises and recovering a judgment against him which would constitute no bar to an action by the Government to recover the same property back.

In a note to *Lee* v. *Kaufman*, 3 Hughes, 150, Hughes, J., in speaking of the opinion in *Carr* v. *The United States*, says: "There is a *dictum* in the case that where it appears in the course of a suit for possession that the possession assailed is that of the Government, the suit ought to cease; but this is a *dictum*, and I am not at liberty to assume, that the court would intend by a *dictum* to overrule its own judgments in the cases of *Meigs* v. *M'Cluny*, *McConnell* v. *Wilcox*, *Grisar* v. *McDowell*, and *Cooley* v. *O'Connor*." It does not seem to us that *Carr* v. *The United States* is an authority in point upon the question of the right of the plaintiff to maintain this action. And we think that the decision in *Polack* v. *Mansfield*, *supra*, is in harmony with the weight of authority upon that question.

But this is not the only ground upon which the appellant insists that the order denying his motion for a new trial should be reversed. He in fact says, that if it be conceded that the facts admitted by the plaintiff did not constitute a complete defense to the action, that those facts taken in connection with other facts proved at the trial did establish a complete defense.

The case, as now presented, is somewhat complicated by reason of there having been a former trial and judgment and an appeal to this court from an order denying the plaintiff's motion for a new trial in this same action. His motion for a new trial was based upon insufficiency of the evidence to justify the decision of the court, and this court reversed the order upon that ground, in effect holding that upon the evidence before the court on the first trial the plaintiff should have had judgment in his favor (*King* v. *La Grange*, 50 Cal. 328). Unless therefore, the defendant on the last trial proved some material fact which he omitted to prove on the first trial, the decision of this court on the former appeal became the

law of the case. As stated in the brief of respondent: "The effort of the defendant at the first trial was to show that Perry, the executor of Ward, deceased, attempted and purported to convey the community interest of the deceased by his deed to Curtis, and further, that though he did not convey such interest, yet that Mrs. Ward afterwards *ratified* the supposed conveyance of her community interest to Curtis."

It was held on the former appeal that the evidence was insufficient to support a finding that the deceased attempted to dispose of more than his own half of the community property, or that his widow knowingly performed any act indicating, or which could be construed to be a waiver of her rights under the will.

Upon the question of the intention of the testator to devise more than his own half of the community property, the evidence on the last trial was the same as upon the first, and this court, on the former appeal, held that said evidence did not tend to prove any such intention. That, therefore, is no longer an open question in this case.

Upon the question whether Mrs. Ward ratified the sale of her interest in the community property, the defendant introduced a bill in chancery filed in the United States District Court for California on the eighteenth of March, 1854, by James D. and Maria N. Verner, Grace T. Starr, Trustee of Emily H. S. Ward and Emily H. S. Ward, against Joseph R. Curtis and Philo H. Perry, executor, etc. This bill is signed by Magraw and Wills as solicitors for Mr. and Mrs. Verner, and by J. H. Clay Mudd as solicitor for Mrs. Starr and Mrs. Ward, and is verified by Henry Carrington, as attorney in fact of Mrs. Starr and Mrs. Ward. The relief prayed was that the sale by Perry, executor, to Curtis should be set aside, and that the surviving partners of Ward, deceased, should pay over to his executor one-third of the money received and to be received from the United States under the contract of Curtis for the sale of said premises to the United States. In the opinion of the then Attorney-General of the United States: "The bill, from beginning to end, in its body and prayer for relief, affirms the sale to the United States, and seeks only an account and decree to complainants of their due

proportion of the proceeds of the contract of sale to the United States."

Unless the filing of this bill operated as a waiver by Mrs. Ward of her rights under the will of her late husband, or as a ratification of the sale made by the executor, there is no evidence tending to prove that she ever waived any of her said rights, or ratified the sale of her share of the community property, by the executor of said will. For this court held on the former appeal that, independently of the filing of said bill, there was no evidence which tended to prove such waiver or ratification. The theory of the bill as stated, and we think correctly stated, by respondent's counsel is "that Curtis, Perry and Ward were tenants in common of the lot in question, on which was an assay office, and during the life of Ward were negotiating to sell the land, building and machinery to the United States Government for the purpose of a mint, that before the bargain was concluded Ward died, and the surviving partners manipulated the matter, so that Perry, as executor, sold to Curtis, the other surviving partner, all of Ward's interest in the land and assay office for the inventory price, and then Curtis sold out to the Government and the two divided the proceeds. The allegation is that Perry, as sole executor, conveyed testator's interest to Curtis. There is no allegation that Perry conveyed, or purported to convey, Mrs. Ward's interest as survivor of the community to Curtis, or even that the United States supposed they were getting her interest from Curtis, or that they paid anything to Curtis for her interest, or that any portion of the price received by Curtis was on account of her interest."

We are unable to see that there is anything in the bill which tends to prove a ratification of the conveyance of her interest in the community property, which it is claimed that the executor attempted to convey. There is no evidence that she knew that the deed to Curtis purported to convey her interest, and that, with knowledge of all the facts, and of her legal position and rights, she accepted the price of said interest. We do not doubt the correctness of the ruling of the court upon the admissibility of the letter of Magraw and Wills in evidence. It was clearly *res inter alios acta*.

The objection that the court had not the power upon the death of Swain to continue the action against La Grange as his successor in interest comes too late.

Order affirmed.

Morrison, C. J., and Ross, McKinstry, and McKee, JJ., concurred.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

MARY N. HUSSEY, ADMINISTRATRIX OF THE estate of Hannah S. Crane, deceased; Mary Ives Crocker and Kate May Dillon Winship, devisees of Kate D. McLaughlin, deceased; and Richard H. Glassford, executor of James T. Boyd, deceased, appellants,

v.

THE UNITED STATES.

No. 32.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

This is an appeal from a judgment of the Court of Claims dismissing the petition in a suit brought under a special act of Congress (approved Feb. 25, 1905, 33 Stats., 815) to recover $40,000, the alleged value of an undivided one-sixth interest in certain property purchased by the United States in 1853 for

a branch mint in the city of San Francisco, California.

The material facts out of which the claim arises may be stated as follows:

In the year 1853 Joseph R. Curtis, Philo H. Perry, and Samuel H. Ward, associated as general partners under the firm name of Curtis, Perry & Ward, were engaged in the business of assaying and smelting gold for their private account, and also for the United States, at San Francisco, Cal., under a contract with the Secretary of the Treasury by virtue of authority conferred by the act of September 30, 1850. (9 Stats., 53.)

The firm's building and plant was partnership property located on a corner lot at Commercial and Montgomery Streets in the city of San Francisco, and was the principal assaying office of the Pacific coast. (Findings I and II, Rec., pp. 20 and 21.)

Under the act of Congress approved July 3, 1852 (10 Stats., 11), entitled "An act to establish a branch mint of the United States in California," the Secretary of the Treasury entered into a contract with Joseph R. Curtis, by the terms of which Curtis agreed to erect, furnish, and complete in San Francisco, upon the corner lot owned by the firm of Curtis, Perry & Ward, and upon which the partnership business was then being conducted, "a suitable building, and to furnish all the requisite machinery, fixtures, and tools essential for the branch mint in conformity to the act of Congress," and to certain accepted plans and specifications for the sum of $239,900.

This contract was executed on the 15th day of April, 1853. (Finding I, Rec., pp. 19–21.)

Some time prior to this last date, Samuel H. Ward, the junior partner of the firm, had started on a voyage to the Sandwich Islands, and died at sea on the 22d of March, 1853. The news of his death was not received in San Francisco, however, until the 21st of April, 1853. At the time, therefore, when Curtis entered into the contract of April 15, 1853, he did not know of his partner's death, and, as he was dealing with partnership property, it is found by the court below that the contract was made for the benefit of the firm. (Finding II, Rec., p. 21.)

Ward left a will appointing his two partners, Perry and Curtis, executors with full power to manage and dispose of his entire estate as they should deem meet and as fully as he might have done if living. An undivided one-tenth of his whole estate was devised to his sister, Marion M. Verner, and the rest and residue thereof, both real or personal, owned or possessed by him at the time of his death, was devised in trust to his widow, Emily H. S. Ward.

The will was in due course proved and allowed in the probate court of the city and county of San Francisco, and Perry alone qualified as executor thereunder.

Thereafter, on the 23d of August, 1853, Ward's entire estate was inventoried and appraised by a duly constituted board of appraisers and the value of the whole of the partnership lot named in the con-

tract of April 15, 1853, was fixed by the appraisers at $40,000.

Six days later, on the 29th of August, 1853, Perry, as executor, made and executed a deed purporting to convey to Curtis all the interest in the partnership lot named in the contract of April 15, 1853, of which Ward had died seized and possessed, and received in payment therefor the sum of $13,333.33.

In accordance with the terms of Ward's will nine-tenths of the above-named $13,333.33 was duly paid to his widow by said executor and accepted by her with full knowledge of the sale by Perry as executor to Curtis, but in ignorance of the extent of her estate in the land in dispute, as subsequently established by the decision of the Supreme Court of California wherein was construed for the first time the law of that State respecting the extent of the power of testamentary disposition over community property. (Finding II, p. 21.)

On March 18, 1854, Ward's widow, together with her colegatee and heirs at law, filed a bill in equity in the United States District Court for the Northern District of California against Perry and Curtis, alleging that the contract of April 15, 1853, between Curtis and the Secretary of the Treasury for the sale of the partnership lot and the furnishing of the necessary machinery, tools, and furniture essential for the branch mint, although made in the name of Curtis, was in truth and fact for the benefit of the partnership.

The bill prayed that Perry and Curtis should be compelled to account for all receipts and expenditures in adapting said premises for a branch mint; that the sale by Perry as executor of Ward's interest in the partnership premises to Curtis should be set aside and that the defendants be required to account and pay over for the benefit of the legatees one-third of all money received from the United States under the contract of Curtis with the United States, deducting therefrom the purchase money paid by Curtis to Perry as executor for Ward's interest therein. (Rec., pp. 22–24.)

On March 31, 1854, Mrs. Ward, through her counsel of record, notified the Secretary of the Treasury by letter, of the filing of said bill and inclosed a copy of the same. Prior to receipt of this letter the United States had already paid said Curtis the sum of $100,000. (Finding II, p. 24.)

Thereafter, on May 2, 1854, the Secretary of the Treasury, in accordance with the provisions of the contract of April 15, 1853 (Finding I, p. 20), submitted the deed of Curtis purporting to convey the property named in said contract, to the Attorney General for his opinion as to the validity of the title thus attempted to be conveyed. In an opinion dated the following day (printed as an appendix to this brief, *post*, pp. ——), and after a full review of all the papers in the case, the Attorney General approved the title and conveyance, and declared,

with reference to the bill in equity, theretofore filed by Mrs. Ward and her colegatee, that—

> The bill from beginning to end in its body and prayer for relief affirms the sale to the United States and seeks only an account and decree to complainants of their due proportion of the proceeds of the contract of sale to the United States. (*King* v. *La Grange*, 61 Cal., 231.)

Subsequently, in May and June, 1854, the balance of the purchase price due under the contract was paid to Curtis by the United States, which forthwith went into possession and used the property as a branch mint and has remained continuously in possession ever since. (Finding II, p. 21.) The bill in equity filed by Mrs. Ward and her colegatee was dismissed in June, 1854, by complainant's counsel of record. (Finding II, p. 24.)

Thereafter, in March, 1855, Perry filed a petition in the Supreme Court of New York, in which Mrs. Ward and all other *ces que trusts* under Ward's will voluntarily joined, setting forth among other things the existence of the partnership, the death of Ward testate, and the proof of his will in the probate court of California, to which was annexed a copy of said will. The petition further alleged that Perry alone qualified as executor; that a large proportion of the property and estate of the testator consisted of real estate in which the partners were tenants in common, and personal effects in which they were jointly interested; that said executor had received

the principal part of said estate, amounting in all to the sum of $69,954.04, about two-thirds of which had already been paid over to the trustee named in the will for the benefit of Mrs. Ward, and that the balance thereof, consisting of cash and securities, remained in his hands; that said executor had removed from California and become a citizen of New York, and that all the funds of the estate were at that time within the jurisdiction of the courts of New York. And further, that all the *ces que trusts* under said will being of full age and joining in said petition, the executor prayed authority to pay over the balance of said trust funds in accordance with the terms of the will, under the authority and direction of the court, and to be discharged from further liability thereunder.

The matter was thereupon referred to a referee for a statement of account, and it was ordered that upon the receipt of the referee's report establishing the balance in cash and securities in the executor's hands, and the paying over of the same to the trustee named in the will, said executor should be discharged from his trust, and said trustee was authorized to receipt in full for such payment and delivery, which receipt and discharge were required to be filed in court. The referee's report was made and confirmed in open court on June 6, 1855, and in accordance with the terms of the will and said order one-tenth and nine-tenths of the proceeds of all property owned by Ward at the time of his death was paid to the testator's sister and to his widow, Emily H. S. Ward, respectively, each of whom accepted the same

without protest or objection and with full knowledge that the sale by Perry to Curtis was intended as a conveyance of Ward's entire one-third interest in the partnership property. Thereafter, under the terms of said order, Perry was discharged from all further liability. (Rec., pp. 25–26.)

One month later, in the summer of 1855, the Supreme Court of California, for the first time, decided that although under the community laws of that State the husband was vested with the entire control of the common property of the husband and wife with power to dispose of the same during his life, yet, under the California law, only one-half of said property was subject to his testamentary disposition, the other half vesting absolutely in the wife by operation of law. (*Beard* v. *Knox*, 5 Cal., 252.)

Ten years after this decision, on October 25, 1865, under and by virtue of authority conferred by a power of attorney, H. W. Starr, as attorney in fact for Ward's widow, executed a deed in the city of New York, which was not acknowledged until March, 1866, purporting to grant, bargain, and sell to one James L. King, for a consideration of $100, all the estate, right, title, and interest of Emily H. S. Ward of, in, or to lands in the city of San Francisco or elsewhere in the State of California whereof her former husband died seized or possessed, except certain designated lots in no way material to this case, and all her interest in the rents, back rents, issues, and profits of any real estate in California whereof her

husband died seized or possessed. (Rec., pp. 9, 29, and 30.)

On the 7th of November, 1867, King, by his attorney in fact, conveyed by a general deed to one W. W. Crane, jr., and James T. Boyd, for a consideration of $10, an undivided one-third of all the estate, real and personal, thus conveyed to him, excepting one specified lot, together with all and singular the tenements, hereditaments, etc., and the reversions, remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity. (Rec., p. 33.)

In June, 1867, King commenced an action of ejectment in the State courts of California against one La Grange, the superintendent of the United States Mint at San Francisco, to recover an undivided one-sixth of the lot conveyed by Ward's executor to Curtis, and by Curtis to the United States, upon which the mint was located, claiming that as Ward's undivided one-third interest therein was common or community property, his will under the laws of California operated only upon an undivided one-half of said one-third interest, and that his widow, Emily H. S. Ward, therefore, continued to be the owner of the remaining one-half which it was claimed had passed to King under the general terms of the deed of conveyance from Starr, her attorney in fact, executed in October, 1865.

Judgment was rendered for the defendants in the trial court, but was reversed upon appeal by the

Supreme Court of California, upon the ground (1) that there was nothing in the proof to show that the testator attempted to dispose by his will of more than his share of the common property, or (2) that his widow knowingly performed any act indicating or which could be construed to be a waiver of her rights under the will. (*King* v. *La Grange*, 50 Cal., 328, 333.)

In the meantime, King, in September, 1879, conveyed to Charles M. McLaughlin, for $5 and other valuable considerations, all his title remaining in said partnership lot or any other lands in San Francisco under the above deed from Mrs. Ward's attorney. (Rec., pp. 31 and 32.)

The second trial of the cause upon the same evidence resulted in a judgment for the plaintiff, which was affirmed by the Supreme Court of California at the August term, 1882. (61 Cal., 221.) A writ of error was thereupon sued out to this court, which was afterwards dismissed, in May, 1884, upon the Government's motion.

In March, 1896, the claim at bar first came before the Court of Claims by reference from the Committee on War Claims of the House of Representatives under section 1 of the act of March 3, 1883, commonly known as the Bowman Act (22 Stat., 485). The court made findings (Rec., pp. 2–17) similar in all essential particulars to those made in the present proceeding (Rec., pp. 18–38). These findings were certified to Congress, as required by that act, in 1896, but no action was taken thereon by Congress.

Nine years later Congress passed the following special act, approved February 25, 1905 (33 Stat., 815), under which the present suit was commenced:

> That jurisdiction be, and the same is hereby, conferred on the Court of Claims to hear the claim of Hannah S. Crane and others for the value of certain real property in the city of San Francisco, in the State of California, in which they claim an undivided one-sixth interest, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said real property as claimed, said court shall award the said parties the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States. And before receiving the same, all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property, and any defense, set-off, or counterclaim may be pleaded by the United States, as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

New evidence having been submitted, the Court of Claims proceeded to try the case as pending under its general jurisdiction as modified by the special jurisdictional act. The former findings certified under the Bowman Act reference were amended and some new findings made, but the action under the Bowman

Act as regards the findings then made was not disturbed and the value of the undivided one-sixth interest of Ward's widow in the property in suit was found at the time possession was taken of it by the United States to be $6,666.66. (Finding VII, p. 38.)

Upon the findings as thus amended the Court of Claims held that the judgment of the Supreme Court of California sustaining the title upon which this claim is based was not conclusive upon it under the jurisdictional act in this case; that Mrs. Ward ratified the sale of the property by Curtis and Perry to the United States and that her grantees accordingly have no valid title to the disputed premises.

The error assigned in general terms is the refusal of the court to sustain the title set up by the appellants and award "the market value of the undivided one-sixth of said property at the time possession was taken of it by the United States."

ARGUMENT.

The principal objection urged as the basis for this appeal is the refusal of the Court of Claims to regard the question of the validity of appellant's title as conclusively established in this case by the decision of the Supreme Court of California in the ejectment suit which upheld the title of Mrs. Ward upon which appellant's claim entirely depends. (Appellant's brief, p. 9.)

The ejectment suit in the courts of California, however, as will be recalled, was directed against the superintendent individually as the custodian of the

mint. The United States was not a party to that suit, nor could it have been made such without its consent expressly given by congressional enactment.

I.

That the United States can not be made a defendant to any suit concerning its property and that no judgment in any suit against an individual who has possession or control of such property as its agent can bind or conclude the Government has long been settled by the decisions of this court and admits of no dispute.

Carr v. *United States,* 98 U. S., 433.
United States v. *Lee,* 106 U. S., 217.
Scranton v. *Wheeler,* 57 Fed. Rep., 807.

Much stress is laid by appellant's counsel upon the fact that throughout the litigation in the courts of California the United States district attorney, by direction of the Secretary of the Treasury and the Attorney General, appeared on behalf of the United States for the defendant and conducted the defense. (Brief, p. 9.)

And it is argued that as appellant's title has thus been sustained in the elaborately contested suit in ejectment against the agents of the Government in possession of the property, it is the duty of this court to adopt and follow the judgment of the State court and hold that the United States is concluded by that judgment from asserting its defense to this action. (Brief, pp. 9–12.)

In the case of *Carr* v. *United States, supra,* this court had occasion to consider upon strikingly similar facts this same contention and it was there squarely

decided that the judgment of a state court of competent jurisdiction in an ejectment suit brought by an alleged owner of real estate against agents of the Government in possession and claiming the right of the same by virtue of such agency, could not estop the United States from the assertion of its rights in a subsequent proceeding to which it was a party.

The Carr case arose upon a bill to quiet title filed by the United States in the Circuit Court of the United States, for the District of California, against the appellant Carr and various other persons, and related also to certain lots in the city of San Francisco, the titles to which were claimed by the United States by virtue of occupation and conveyance from that city. The defendants in the lower court set up by way of estoppel judgments in ejectment rendered by the State courts of California at the suit of their grantor against officers in possession of the lands in controversy, as agents of the Government in whose behalf (as in the case at bar) the United States district attorney and also additional counsel, specially employed by the Secretary of the Treasury, appeared.

The Circuit Court refused, as did the Court of Claims, in this case and upon the same grounds, to regard the judgments relied on as constituting an estoppel against the United States, or as precluding the court from examining into the merits of the whole controversy and determining for itself the validity of the title to the property in dispute, which, from the facts disclosed by the record it found was

vested exclusively in the United States, notwithstanding the judgments of the State courts.

Upon appeal this court, after a careful review of all the facts involved, affirmed the decree of the Circuit Court, and in the course of the opinion, delivered by Mr. Justice Bradley, said respecting the appearance and defense of the suits in the State courts by the law officers of the United States:

> The appellant contends that this was sufficient to make the United States a virtual party to said actions, and to conclude them by the judgment therein; that by the law of California a judgment in ejectment is an estoppel; and that where a tenant, or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronou ced in the action; and to this point the counsel of the appellant cited *Douglas* v. *Fulda* (45 Cal., 592); *Russell* v. *Mallon* (38 id., 259); and *Valentine* v. *Mahoney* (37 id., 389), as well as various cases decided in other States.
>
> Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the Government of the United States. We consider it to be a fundamental principle that the Government can not be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the Government suable in its courts.
>
> * * * * *

> It may be contended that the United States consented to have its title determined in these cases, a d that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defence. But we do not think that any such inference can be legally deducted from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And, in fact, he had no authority to waive those rights.

Counsel is in error in his statement (brief, p. 14) that the decision in the Carr case was materially qualified by the later decision in *United States* v. *Lee*, *supra*.

On the contrary, the principle upon which the decision in the Carr case rested was there reviewed and again affirmed by this court, speaking through Mr. Justice Miller, in the following language (p. 222):

> Another consideration is that since the United States can not be made a defendant to a suit concerning its property and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of *Carr* v. *United States*, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights.

It is true that in a subsequent sentence in the same paragraph the court suggests, by way of illustration, four alternatives which the Government might take if dissatisfied with the judgment of the State courts in ejectment suits against Government officers. But obviously that suggestion was not intended as a declaration that no other alternative was open to the Government for the assertion of its claims; nor can it be construed as a qualification of the principle involved in the decision in the Carr case.

The further fact emphasized by appellant's counsel (Brief, p. 15) that the estoppel relied on in the *Carr* case were judgments of inferior State courts from which no appeals were taken to the Supreme Court of the State, and that no attempt was subsequently made to obtain the decision of a United States court on the validity of the plaintiff's title as established by the judgments of the State courts, is not material nor does it lessen in the slightest degree the controlling authority of the *Carr* case, since the question of title in at least two of the cases in the State courts was fully considered and decided in favor of the plaintiffs, and as between parties to such suits therefore was strictly *res adjudicata*.

II.

Jurisdiction conferred by the special act.

Not only is appellants' principal complaint against the adverse action of the court below flatly opposed to the settled doctrine of this court as announced in *Carr* v. *United States* and *United States* v. *Lee, supra*,

but it is also in direct conflict with the explicit language of the jurisdictional act under which this suit was brought.

By that act special jurisdiction was conferred upon the Court of Claims to hear this claim,

> (1) "Upon the evidence already filed and such additional legal evidence as may be hereafter presented on either side," and
>
> (2) To award the parties the market value of the real property in dispute *if* it shall be found that said parties "*acquired a valid title to said real property as claimed.*"
>
> (3) "And before receiving the same all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property, and *any defense, set-off, or counterclaim may be pleaded by the United States, as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.*"

It is appellant's contention, inasmuch as substantially all the facts now before the court had already been made known to Congress by the findings previously certified by the Court of Claims under the Bowman Act reference, that it can not be reasonably supposed that Congress again referred the claim to that same court to enable it to review the reasoning by which the Supreme Court of California reached its conclusions in the ejectment suits. (Appellant's brief, p. 13.)

But if such was not the intention of Congress, for what purpose was the jurisdictional act passed? It

is no answer to say that the second reference was for the purpose of ascertaining the reasonable value of the property, and awarding that value to the claimants if they are found to have succeeded to the title of King, the original grantee of Mrs. Ward, for every material fact necessary to the disposition of the claim upon that theory had already been made known to Congress by the findings certified to it as the result of the first reference of the claim.

By those findings the value of the property was definitely fixed (counsel's statement at p. 13 of appellant's brief to the contrary notwithstanding; see Rec., pp. 5–8); the grounds upon which the claim to the property is now based, including the judgment of the State courts and the various conveyances under which appellants derived their alleged title, were all clearly and fully set forth. Those findings, however, did not contain nor did the provisions of the Bowman Act permit the court below to express its views upon the legality of the claim nor the reasoning upon which the validity of the claimant's titles had been upheld by the State courts.

Under such circumstances and in view of the language of the jurisdictional act which expressly declares that *any defense* may be pleaded by the United States in this action, it seems clear beyond controversy that Congress has neither recognized the legality of the claim nor the validity of appellant's title to the disputed land, but that by the passage of the jurisdictional act it has merely recognized a right in the claimants to assert a claim, and has provided a forum

wherein such rights and those of the United States may be judicially ascertained and finally settled.

As is well said in the opinion of the court below in rejecting the construction of the jurisdictional act for which appellants again contend:

> It would indeed be a travesty upon justice to refer to the Government's tribunal a claim as to which the court had nothing to do except indulge in mathematical calculation and enter judgment accordingly. The act would simply resolve itself into legislation designed to revive and pay a claim previously litigated to conclusion, but lost to settlement by lapse of time. The Congress never so intended in the act of jurisdiction. We are charged with according full probative effect to the evidence already filed in the case, and permitted to consider "such additional legal evidence as may be hereafter presented on either side." The proceedings are to be in all respects, except as specifically modified, in accord with the general jurisdiction of this tribunal, and expressly reserving to the defendants the right of *any defense* available.

III.

Rule of property established by State decisions, not invaded.

Nor does an examination of all the facts disclosed by this record and the adjudication of the whole case upon its merits, including defenses interposed by the United States "as in cases within the general jurisdiction of the court," invade or contravene

the familiar and indisputable rule laid down in *Warburton* v. *White*, 176 U. S., 495, 496, and reaffirmed in *Clark* v. *Clark*, 178 U. S., 186, that where the decisions of the highest court of a State have definitely and conclusively established a rule of property this court in interpreting the State law will follow, if possible, the decisions of the State court and thus conform to the rule of property within the State.

For the conclusiveness of the decision of the State courts holding this property to be community property, and that the wife's one-half interest therein became absolute upon the death of her husband and was not subject to his testamentary disposition, are purely questions of State law and are in no manner contested.

The defense successfully interposed to the claim in the court below, and the one upon which we rely to sustain the judgment upon this appeal is that of acquiescence and ratification by Mrs. Ward of the acts of her husband's executor in disposing of the whole of the community property.

The question thus raised manifestly involves the application of a principle of general law, and being properly raised in the first direct proceeding in which it has consented to become a party, the United States clearly can not now be held to be concluded in this suit by the decision of the courts of California rendered many years ago between wholly different parties strangers to this record.

If we may again venture to quote the extremely apposite language of the opinion of the court below:

> The decision herein does not invade a settled rule of property as established by the Supreme Court of California; it in no wise ignores or contradicts the legal existence of a communal estate as between husband and wife; nor disregards settled law as to power of testamentary disposition over the same. It simply grants to the defendants their day in court, a right paramount in extent, the denial of which is fatal to all judgments or decrees rendered either against the person or property of one not a party to the record. (Rec., p. 42.)

IV.

Ratification.

Before proceeding to a discussion of the facts relied upon to sustain the defense of ratification it is necessary to call attention to the erroneous statement at page 16 of the appellant's brief that "the partnership property which the Government had agreed to buy for $239,900 was appraised by the board of appraisers at about one-sixth of that sum, or $40,000." The appraisal made in August, 1853, was of the value of the whole of the partnership lot named in the contract of April 15, 1853 (Finding II, p. 21), whereas the $239,900 was price paid to Curtis in 1854 by the Secretary of the Treasury under that contract, *but after* the completion of the extensive alterations and additions to the premises and the installation of the new machinery, tools, and fixtures called for by the

elaborate plans and specifications, in accordance with the requirements contained in the act of July 3, 1852, 10 Stats., 11. (Finding I, pp. 18–21.)

While it is true the findings show this contract to have related to the partnership property and therefore to have been made for the benefit of the partnership firm (Rec., p. 21), the appraisement had nothing whatever to do with the value of the property *after* the completion of the alterations and additions, for the appraisement was made in August, 1853, and the work under the contract was not finished until sometime after March, 1854. Moreover, no statement of actual cost of the work done under the contract nor the fact that any profit whatever accrued to Curtis thereunder is contained in the findings. The value, however, of Mrs. Ward's undivided one-sixth interest in the property in suit at the time possession was taken by the United States is definitely fixed by the findings at $6,666.66, or one-sixth of $40,000.

The rule as to what constitutes a ratification of unauthorized acts is well stated in Mechem on Agency (sec. 157), as follows:

> Where a person assumes in good faith to act as agent for another in any given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must within a reasonable time disaffirm such act, at least in cases where his silence might operate to the prejudice of

> innocent parties, or he will be held to have ratified such unauthorized act.
>
> (1 Am. Eng. Ency. Law, p. 189; Mechem on Agency, pp. 1192, 1195–1197.)

Under the head of "No estoppel or acquiescence" counsel attempts to review (brief, pp. 16–20) the facts which were held by the lower court to constitute a ratification by Mrs. Ward of the unauthorized disposition of her community interest, and in the course of the argument based upon that review, it is declared, at page 17, of appellant's brief:

> Nowhere was there any pretense of purchasing her community interest in the property or of giving her anything but what she was entitled to out of Ward's interest in accordance with the terms of his will.

And again on page 18:

> There is no evidence anywhere in the record of any acquiescence by Mrs. Ward in the attempt to dispose of her community property.

These assertions are not only misleading, but they are flatly opposed to the finding of facts contained in the record from which it appears that Mrs. Ward was at the time of the conveyance of the whole of the community property from Perry to Curtis fully acquainted with all the facts surrounding that transaction. It is true that she did not know at that time of the extent of her estate in the land in question, and that Perry's conveyance as executor, standing alone without ratification, did not transfer her individual interest in the communal property of her

deceased husband. But there can be no doubt that it was Ward's intention to devise all of the property here in suit; his executors so understood it; the probate court of San Francisco, by its allowance and proof of the will, and the board who appraised the whole value of that lot so understood it; Mrs. Ward and her colegatee, who accepted and retained without protest or objection the value of the entire lot, including her communal interest as thus fixed by the appraisers, so understood it; as did also the Supreme Court of New York from the contents of the petition filed by Perry as executor, in which Mrs. Ward and her colegatee and heirs at law joined, wherein were set forth in detail the receipts and disbursements and all acts of the executor pertaining to the management of the estate, which, after reference to a referee, was fully approved and the executor discharged without protest or objection.

In 1855 the Supreme Court of California decided the case of *Beard* v. *Knox* (5 Cal., 252), and Mrs. Ward became for the first time acquainted with the extent of her interest in the estate of her deceased husband and her title to the property in question. Remedies were then immediately available for the correction of this alleged injury, and, as declared by the court below:

> The courts of California were open to Mrs. Ward for the assertion of her claim and suits to quiet title or in ejectment were clearly maintainable. (*Carr* v. *United States, supra.*)

No such proceedings were instituted, however, and for more than ten years Mrs Ward remained

silent, until finally, in October, 1865, by a deed which, however, was not acknowledged until some six months later in 1866 by her brother, H. W. Starr, as attorney in fact, whatever interest Mrs. Ward may have possessed in the premises was then attempted to be conveyed for a nominal consideration to James L. King. As is so forcibly stated by the court below:

> It is indeed a strange proceeding, certainly inequitable, to now permit Mrs. Ward's grantees to assert against the defendants a claim which she permitted to repose for ten years without ever resorting to any established legal remedy, and which was notoriously open to disaffirmance or repudiation during this long period of time. There is absolutely nothing in the record which even hints at a repudiation of Perry's acts in conveying all the estate of both Mr. and Mrs. Ward in the partnership property to Curtis. There is nothing to show that Mrs. Ward was dissatisfied with the transfer in question or sought to annul the same at any time subsequent to its execution.

Mrs. Ward having accepted and retained the proceeds of that sale for more than 10 years in complete silence and never at any time expressing the slightest dissatisfaction, much less directly disaffirming the executor's act, the language of the Supreme Court of Louisiana in *Lafitte* v. *Godchaux* (35 La. Ann., p. 161) is peculiarly appropriate to the facts in this case.

> The genius of our law does not favor the claims of those who have long slept upon their rights and who after years of inertia, conveying an assurance of acquiescence in a given state of things, suddenly wake up at the welcome vision of an unexpected advantage and invoke the aid of the courts for relief under the operation of a newly discovered technical error in some ancient transaction or settlement.

So in *Alexander* v. *Jones* (64 Iowa, 207) it was declared:

> That where an agent without authority sold the land of the principal with the knowledge of the latter, who made no objections for more than four years, during which time the purchaser had been occupying and improving the land, the principal is held to have acquiesced in the sale.

CONCLUSION.

"If the facts found in this case," as is well said in the opinion of the court below, "do not constitute a ratification of an act done by one without authority to act in the first instance, it is difficult to perceive how the doctrine of ratification can be sustained."

It is respectfully submitted that the judgment of the Court of Claims dismissing the petition herein was correct and that said judgment should be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney General.
FREDERICK DE C. FAUST,
Attorney.

APPENDIX.

ATTORNEY GENERAL'S OFFICE,
3d May, 1854.

SIR: In answer to your communication of yesterday, submitting to me the deed of Joseph R. Curtis of the same date, purporting to convey to the United States a certain piece of land with buildings thereon, intended as a branch mint, in San Francisco, with papers appertaining to the title of said land, I have to observe that on the 21st of July, 1853, upon an abstract of title of two certain adjoining lots of land in question, making together a front of sixty feet on Commercial Street, I gave my opinion that said Curtis and Philo H. Perry had a valid title in one lot and power to convey the other.

It now appears that the whole title to both lots is duly vested in Curtis alone, according to the certificates filed. It further appears that a bill in equity is pending by James D. Verner and others, as legatees and as widow of Samuel H. Ward, complainants, *v.* Joseph R. Curtis and Philo H. Perry, surviving partners of the late copartnership of said Curtis, Perry, and Samuel H. Ward, since deceased, as to which it is to be observed that the bill distinctly alleges that these lots, with machinery of the assay office, and its fixtures, tools, and implements, were the property of the copartnership and belonging to the business which the copartners were carrying on; that the contract of the 15th of April, 1853, between the United States and said Curtis, although made in said Curtis' own

name, was nevertheless for the use and benefit of the said copartnership of Curtis, Perry & Ward, with full authority and with such understanding by and between the parties in interest in the said establishment. The bill from beginning to end, in its body and prayer for relief, affirms the sale to the United States and seeks only an account and decree to the complainants of their due proportion of the proceeds of the contract sale to the United States. Of course it does not affect the question of title.

Having inspected the deed of conveyance of these two lots from Joseph R. Curtis to the Secretary of the Treasury for and on account of the United States, bearing date 2nd May, 1854, acknowledged before two justices of the peace, and certified under their hands and seals, my opinion is that said deed conveys a good and valid title to the United States for the land and appurtenances in the said deed described.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

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